Supreme Court, U.S.
FILED

03 761 NOV 19 2003

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No. _____

IN THE

Supreme Court of the United States

RANCHO VIEJO, LLC,

Petitioner,

v.

GALE A. NORTON, Secretary of the Interior, *et al.*,*

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the D.C. Circuit's decision holding, on grounds that conflict with a recent decision of the Fifth Circuit, that Congress has the authority under the Commerce Clause of the Constitution, through application of the Endangered Species Act, to authorize the regulation of private lands to protect against theoretical harm to the habitat of the wholly intrastate and commercially-irrelevant arroyo toad, is contrary to this Court's recent Commerce Clause decisions in *United States v. Lopez*, *United States v. Morrison*, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, and *United States v. Jones.*

RULES 14.1(b) AND 29.6 STATEMENT

Petitioner, Rancho Viejo LLC, is a California limited liability corporation that has never issued shares to the public. It does not have a parent corporation, nor is there any publicly-held company which owns ten percent or more of its stock.

Respondents are: Gale A. Norton, Secretary of the Interior; the United States Department of the Interior; the United States Fish and Wildlife Service; the United States Army Corps of Engineers; and Colonel Richard G. Thompson, Los Angeles District Commander, U.S. Army Corps of Engineers.

The following additional entities participated as *amici curiae* in the Court of Appeals or in the District Court: the National Wildlife Federation and the Pacific Legal Foundation.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Rancho Viejo, LLC ("Rancho Viejo") respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 323 F.3d 1062. That court's per curiam order denying Petitioner's petition for rehearing en banc, and the opinions of Judges Sentelle and Roberts dissenting from the denial of the petition for rehearing en banc (Pet. App. 32a-37a), are reported at 334 F.3d 1158. The opinion of the district court is unofficially reported at 2001 WL 1223502 and 32 Envt'l L. Rep. 20,112.

STATEMENT OF JURISDICTION

The decision of the court of appeals upholding the constitutionality of regulations extending the federal Endangered Species Act to wholly intrastate, non-commercial species was entered on April 1, 2003. The court denied a petition for rehearing on July 22, 2003. A timely request for extension, filed on October 10, 2003, was granted by Chief Justice Rehnquist on October 16, 2003, extending the time in which to file this petition until November 19, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. Jurisdiction in the District Court was based on 28 U.S.C. § 1331. Jurisdiction in the Court of Appeals was based on 28 U.S.C. § 1291.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are as follows:

1) U.S. Const. Art. I, § 8, cl.3: "The Congress shall have power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

2) 16 U.S.C. § 1532(6): "The term 'endangered species' means any species which is in danger of extinction throughout all or a significant portion of its range ...."

3) 16 U.S.C. § 1532(19): "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

4) 16 U.S.C. § 1538(a)(1): "Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for

any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

STATEMENT OF THE CASE

As Judge Sentelle noted below in his dissent from the denial of the petition for rehearing en banc, this case involves a Commerce Clause challenge to the federal government's regulation of "an activity that is neither interstate nor commerce." Pet. App. 33a. Specifically, this case addresses whether a federal regulatory agency has exceeded the scope of the Commerce Clause by extending § 9(a)(1)(B) of the federal Endangered Species Act to wholly intrastate, non-commercial species, and by prohibiting such non-commercial activity as the erection of a fence on private property merely because the fence might hinder movement of those species.

Petitioner Rancho Viejo, LLC ("Ranch Viejo") is the owner of a 202-acre parcel of land in San Diego County, California, 52 acres of which it proposes to utilize for the construction of homes. Joint Stipulation of Facts ("JS") ¶ 2 (Pet. App. 38a). Rancho Viejo has been threatened with federal prosecution for erecting a perimeter fence on its property, and its efforts to obtain the necessary grading permits from local governmental officials have been thwarted, because of assertions by the United States Fish and Wildlife Service (the "Service") that a portion of Rancho Viejo's property may be potential habitat for the southwestern arroyo toad (*Bufo microscaphus californicus*). JS ¶¶ 10, 12 (Pet. App. 41a). The arroyo toad was listed as "endangered" by the United States Fish and Wildlife Service (the "Service") in 1994 pursuant to the Endangered Species Act of 1973 ("ESA"), Pub. L. 93-205, 81 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-44). *See* JS ¶¶ 4, 9, 10 (Pet. App. 39a, 41a); *see also* 58 Fed. Reg. 41,231 (Aug. 3, 1993) (proposed listing); 59 Fed. Reg. 64,859 (Dec. 16, 1994) (final rule). The Service's listing did not contain express findings of any connection between the arroyo toad and interstate commerce, and in a subsequent designation of 182,360 acres as arroyo toad habitat the Service specifically found that its habitat designation would have no significant impact on commerce. JS ¶ 4 (Pet. App. 39a); 66 Fed. Reg. 9414, 9440 (Feb. 7, 2001).

Asserting that Respondents' actions—both in listing the arroyo toad and in threatening prosecution for conduct that might effect the toad's habitat and movement—exceeded Congress' power to regulate commerce among the states, Rancho Viejo brought this suit for declaratory and injunctive relief. Complaint ¶¶ 1, 34.

The parties executed an extensive Joint Stipulation of Facts (Pet. App. 38a-43a) and subsequently filed cross motions for summary judgment. The district court, Judge Ellen Segal Huvelle, denied Rancho Viejo's motion for summary

judgment and, after rejecting Defendants' contention that the case was not ripe, granted Defendants' motion for summary judgment, holding that the decision of the court of appeals in *National Ass'n of Home Builders v. Babbit*, 130 F.3d 1041 (D.C. Cir. 1997) ("*NAHB*"), was dispositive, notwithstanding the subsequent decisions in *United States v. Morrison*, 529 U.S. 598 (2000), and *Solid Waste Agency of N. Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"). The district court entered final judgment for Defendants on August 20, 2001. Rancho Viejo's timely notice of appeal was filed on October 17, 2001.

On appeal, a panel of the court of appeals, consisting of Chief Judge Ginsburg and Judges Edwards and Garland, affirmed. Pet. App. 1a-31a. Petitioner's petition for rehearing and rehearing en banc was subsequently denied on July 22, 2003, with dissenting opinions by Judges Sentelle and Roberts emphasizing that the panel's decision is inconsistent with this Court's Commerce Clause precedents and conflicts with the decision of the Fifth Circuit in *GDF Realty, Inc. v. Norton*, 326 F.3d 622 (5th Cir. 2003). *See* Pet. App. 32a-37a.

REASONS FOR GRANTING THE WRIT

The lower courts—most recently the D.C. Circuit below and the Fifth Circuit in *GDF Realty*—have been struggling to find a rationale that would render the government's extension of § 9(a)(1)(B) of the federal Endangered Species Act to wholly intrastate, non-commercial species consistent with this Court's Commerce Clause jurisprudence. Their efforts, described in Part II below, have given birth to a number of different, mutually-exclusive rationales, creating a split in reasoning among the circuits that undermines the holdings of those courts. More fundamentally, as described in Part I below, the different rationales that have been relied upon are simply incompatible with this Court's decisions in *Lopez*, *Morrison*, *SWANCC*, and *Jones*, and would, if allowed to remain as precedent, destroy this Court's long-recognized distinction between that which is national and that which is

truly local. *See United States v. Lopez*, 514 U.S. 549, 557 (1995) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)). Certiorari is warranted here to address this split in circuit court rationales in an area of constitutional significance, and to address whether Congress has the authority, consistent with this Court's Commerce Clause precedent, to regulate wholly intrastate, non-commercial species and the local activities that affect their habitat.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S RECENT COMMERCE CLAUSE DECISIONS.

In the wake of this Court's landmark decision in *United States v. Lopez*, reaffirming the foundational principle that the national government has only limited, enumerated powers, the lower courts have been faced with Commerce Clause challenges to a number of federal statutes and regulations aimed at conduct that has nothing to do with interstate commerce. *See, e.g.*, Glen H. Reynolds & Brannon P. Denning, *Lower Court Readings Of Lopez, Or What If The Supreme Court Held A Constitutional Revolution And Nobody Came?*, 2000 Wisc. L. Rev. 369 (2000) (citing cases). Of particular relevance here, the D.C. Circuit in 1997 rejected a Commerce Clause challenge to federal regulation under the Endangered Species Act of wholly intrastate activities affecting the Delhi Sands Flower-Loving Fly, a subspecies that exists only in a small area of southern California. *NAHB*. As Judge Sentelle noted in dissent at the time, that decision was hard to square with *Lopez*. It is even harder to square with this Court's subsequent reaffirmation and explication of *Lopez* in *Morrison*, *SWANCC*, and *Jones*. Nevertheless, the D.C. Circuit's decision below followed its own decision in *NAHB* rather than this Court's decisions.

Lopez set out three categories of activity that could be regulated under the Commerce Clause power: 1) "the use of the channels of interstate commerce"; 2) "the instrumentalities of interstate commerce, or persons or things in interstate

commerce, even though the threat may come only from intrastate activities"; and 3) "those activities having a substantial relation to interstate commerce ... *i.e.*, those activities that substantially affect interstate commerce." *Lopez*, 514 U.S., at 558-59 (citations omitted, emphasis added). Although parts of the ESA are clearly permissible as regulations of either the channels or instrumentalities of commerce, *see* 16 U.S.C. §§ 1538(a)(2)(A), (C), (D) (banning the importation, exportation, or sale of listed species in interstate commerce); 16 U.S.C. §§ 1532(19), 1538(a)(2)(B) (banning the hunting, trapping, capturing and collecting of endangered species destined for interstate commerce); *cf. United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1996) (upholding ban on possession of bald eagle feathers, the commerce in which was endangering the bald eagle), this case involves neither. Rather, the listing of the arroyo toad giving rise to this case can stand only if it is directed at activity that "substantially affects commerce."

This Court in *Lopez* set forth four factors to consider in addressing whether a federal regulation is a permissible exercise of Commerce Clause authority under the "substantial effects" test. First, was the regulation one of "economic activity." Second, did the statute have an "express jurisdictional element." Third, were there legislative findings regarding the effects on interstate commerce. And fourth, was the link between the regulated activity and the effect on commerce so attenuated as to leave no stopping point to Congress's Commerce Clause power. Those factors were reaffirmed and elaborated upon by this Court in *Morrison*. 529 U.S., at 610-13; *see also Groome Resources Ltd., L.L.C. v. Parish of Jefferson*, 234 F.3d 192, 203-04 (5th Cir. 2000) (recognizing that in *Morrison* this Court "elucidated" and "refined" the *Lopez* analysis). As discussed below, in its decision upholding the listing of the arroyo toad and Respondents' subsequent enforcement actions, the D.C. Circuit mischaracterized one factor, ignored two others, and ren-

dered meaningless the fourth factor of this Court's four-prong substantial effects test.

A. The D.C. Circuit's position that non-economic activity may be considered for purposes of the Commerce Clause four-prong substantial effects test conflicts with the express recognition in *Morrison* that this Court has heretofore *only* considered economic activity when applying its substantial effects test.

Perhaps the most obvious and important conflict between the D.C. Circuit's holdings below and in *NAHB*, on the one hand, and the holdings of this Court, on the other, is with respect to the first *Lopez* prong—i.e., whether non-economic activity may be considered for purposes of the substantial effects test. In *NAHB,* the D.C. Circuit held that under *Lopez* a "class of activities can substantially affect interstate commerce regardless of whether the activity at issue—in this case the taking of endangered species—is commercial *or noncommercial.*" *NAHB*, 130 F.3d, at 1049 (Wald, J.) (emphasis added). That reading of *Lopez* was expressly repudiated by this Court in *Morrison.* 529 U.S., at 610-11 (noting that this Court has *only* sustained regulations of intrastate activity based upon the activity's substantial effects on interstate commerce where "the activity in question has been some sort of economic endeavor"); *id.*, at 611 n.4 ("In every case where we have sustained federal regulation under *Wickard*'s aggregation principle, the regulated activity was of an apparent commercial character").

The D.C. Circuit in this case did not explicitly hold that "noncommercial" conduct could be aggregated under the first *Lopez* prong, but it specifically noted that it found nothing in *Morrison* to undercut *NAHB*'s holding that *Lopez* allowed regulation of non-economic conduct. Pet. App. 15a. And it effectively reached the same conclusion that *NAHB* had by shifting the focus of the inquiry from the non-commercial activity actually regulated by the ESA (the

"take" of non-commercial toads) to the character of the entity doing the taking (here, a home builder that constructed a fence on its property and proposed ultimately to build some homes). Pet. App. 16a-17a.[1]

The conflict with this Court's decisions in *Lopez* and *Morrison* is manifest. Instead of focusing on the nature of the actor whose conduct was at issue in those cases, as the D.C. Circuit did below, this Court focused on the regulated activity as described by the "terms" of the statutes—gun possession in a school zone in *Lopez*, and gender-motivated violence in *Morrison*, neither of which *by their terms* had anything to do with commerce. *See Morrison*, 529 U.S., at 610 (noting that the statute at issue in *Lopez* "*by its terms* has nothing to do with 'commerce' or any sort of economic enterprise") (emphasis added). Indeed, had the D.C. Circuit's view prevailed in this Court, *Lopez* would have come out differently: Alfonso Lopez brought his gun to school *to sell*—a commercial transaction. *See United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993). *Morrison* would have come out differently as well, because under *United States v. Salerno*, 481 U.S. 739, 745 (1987), the mere possibility that some commercial activity could have been regulated within the bounds of the Commerce Clause would have prevented this Court's holding of facial invalidity.

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[1] In truth, as Judge Sentelle recognized in his opinion dissenting from the denial of Rancho Viejo's petition for rehearing en banc, Pet. App. 36a, even Rancho Viejo's proposed housing development was not "commercial" activity, in the constitutionally significant meaning of the term. Neither the erection of a fence nor the grading of soil, which is the supposed commercial activity resulting in the "take" of arroyo toad habitat at issue here, nor even the construction of homes on pads created as the result of the soil grading, is "commerce among the states." That the equipment used to grade the soil, or the materials used to construct the fence and homes, might at one time have moved in interstate commerce does not make the grading and fence building activities in interstate commerce.

B. The D.C. Circuit also dispensed with the second and third prongs of the "substantial effects" test articulated in this Court's holdings in *Lopez* and *Morrison*.

The D.C. Circuit expressly acknowledged that "Section 9 of the ESA has no express jurisdictional hook that limits its application, for example, to takes 'in or affecting commerce'"—the second prong in this Court's substantial effects analysis—but nevertheless held that the ESA's lack of "an express jurisdictional element is not fatal to a statute's constitutionality under the Commerce Clause." Pet. App. 10a. Instead, the D.C. Circuit chose to apply its own jurisdictional hook, holding that "[t]he absence of such a jurisdictional element simply means that courts must determine independently whether the statute regulates activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affect[] interstate commerce." *Id.*

In *Morrison*, this Court made clear that the jurisdictional element prong is an important part of the "substantial effects" analysis. The statute at issue in *Morrison* failed because instead of including a jurisdictional element, "Congress elected to cast [the statute's] remedy over a wider, and more purely intrastate, body of violent crime." *Id.*, at 613. The same is true in the instant case: Instead of prohibiting the "take" of arroyo toads that have a demonstrated effect on interstate commerce, the Service has elected to cast its net over a wider, and purely intrastate, class of activity. Neither *Lopez* nor *Morrison* permits such broad regulation, and the D.C. Circuit's holding to the contrary warrants this Court's review.

Similarly, the D.C. Circuit dispensed with the third prong of the *Lopez* "substantial effects" test. It expressly acknowledged that "[t]here are no [legislative] findings or history" with respect to the substantial effect on interstate commerce caused by the "take" of arroyo toads, but held that "neither

findings nor legislative history is necessary" because the effect of commercial housing construction on interstate commerce is visible to "the naked eye." Pet. App. 11a.

Again, the D.C. Circuit's holding shifts the focus from the activity actually regulated by the statute (or, in this case, the specific regulatory listing at issue) to the nature of the actor, contrary to this Court's holdings in *Lopez* and *Morrison*. It also rested on a rationale—that the construction of homes is subject to Commerce Clause regulation because the construction materials will have moved in interstate commerce—that was unanimously rejected by this Court in *United States v. Jones*, 529 U.S. 848, 857 (2000):

> Were we to adopt the Government's expansive reading of § 844(i) [the federal arson statute], hardly a building in the land would fall outside the federal statute's domain. Practically every building in our cities, towns, and rural areas is constructed with supplies that have moved in interstate commerce, served by utilities that have an interstate connection, financed or insured by enterprises that do business across state lines, or bears some other trace of interstate commerce. If such connections sufficed to trigger § 844(i), the statute's limiting language, "used in" any commerce-affecting activity, would have no office.

Although *Jones* was a statutory construction case, this Court limited the reach of the statutory language at issue in the case to avoid the "grave and doubtful constitutional questions" posed by the government's broader proposed reading. *See id.* (quoting, e.g., *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)). The D.C. Circuit's holding that Congress can regulate local land use decisions of state and local governments and the local activity of a private actor merely because of speculation that some of the materials that the private actor intends to use to build homes will come from out-of-state raises more than

just grave constitutional doubts; it is flatly inconsistent with this Court's Commerce Clause precedent.

C. The D.C. Circuit's "attenuation" analysis renders meaningless the fourth prong of the *Lopez* "substantial effects" test.

The D.C. Circuit also held that the effect of Rancho Viejo's commercial housing development was not too attenuated an effect on interstate commerce to fail *Lopez*'s forth prong:

> Rancho Viejo's 202-acre project, located near a major interstate highway, is ... one that "is presumably being constructed using materials and people from outside the state and which will attract" construction workers and purchasers "from both inside and outside the state."

Pet. App. 12a (quoting *NAHB*, 130 F.3d, at 1048 (Wald, J.)). As with its discussion of the first and third prongs of the *Lopez* "substantial effects" analysis, the D.C. Circuit shifted the focus from the activity actually regulated—the "takes" of arroyo toads—to the nature of the actor doing the take. By so doing, the D.C. Circuit eviscerated this Court's not-too-attenuated requirement by adopting what amounts to the following logic:

> The effects on commerce of disturbing arroyo toad habitat are direct rather than attenuated, despite the fact that there is concededly no known commerce in arroyo toads, because in this case the alleged habitat disturber wants to build homes, perhaps using materials that will travel in interstate commerce, and the homes it hopes to build will be near a highway, so some people who visit those homes might have traveled in interstate commerce.

If such effects on commerce do not stand in an attenuated relationship with the actual regulatory activity at issue here—

the listing of the non-commercial arroyo toad as endangered, and threatened enforcement action for erection of a fence on private property—then this prong of the *Lopez* "substantial effects" test has no meaning.

In sum, the listing of the arroyo toad aims at conduct that by its terms has nothing to do with interstate commerce. These are not, after all, Mark Twain's celebrated jumping frogs of Calaveras County, bought and sold for their spectacular jumping skills. As a result of the listing, toad habitat disturbances are prohibited whether caused by a "casual walk in the woods" or by sustained commercial activity. Pet. App. 24a-25a. The "taking" of arroyo toads and/or their habitat, therefore, even in the aggregate, has no substantial effect on interstate commerce because the toad is not itself an article of interstate commerce. There is no jurisdictional element that would confine toad "takes" to activities properly within the scope of Commerce Clause power. There are no legislative or regulatory findings that cumulative toad "takes" would have a substantial effect on commerce; indeed, the only findings—that the designation of arroyo toad habitat would *not* have a significant effect on commerce—are directly to the contrary. Finally, that some materials that would be used to build homes by a builder who erected a fence and would have to grade his land to prepare for home construction might have moved in interstate commerce is simply too attenuated a connection with interstate commerce to fall within the Commerce Clause power. In such circumstances, where the claimed connection with commerce is simply and obviously a mere pretext to regulate activity that is purely local and non-commercial, this Court's duty remains what it always has been:

> [S]hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal ... to say that such an act was not the law of the land.

M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819). Because the D.C. Circuit's holding to the contrary conflicts with this Court's Commerce Clause precedent, certiorari is warranted.

II. THE REASONING OF THE DECISION BELOW CONFLICTS WITH A RECENT DECISION BY THE FIFTH CIRCUIT.

The reasoning upon which the D.C. Circuit grounded its ruling below is also "conspicuously in conflict" with the reasoning of the Fifth Circuit in *GDF Realty, Inc. v. Norton*, 326 F.3d 622, 634 (5th Cir. 2003). *See* Pet. App. 35a (Sentelle, J., dissenting from denial of petition for rehearing en banc). There are several grounds of disagreement: First, and perhaps most fundamentally, whether the prohibition on the "take" of wholly-intrastate, non-commercial species can be viewed as aimed at economic activity simply because the particular litigant is an economic actor; second, whether this Court's decision in *Salerno* prevents a facial challenge on Commerce Clause grounds to any statute that reaches some commercial activity; third, whether *Lopez* and *Morrison* permit aggregation of non-economic as well as economic activity for purposes of demonstrating a substantial effect on interstate commerce; fourth, the importance of a jurisdictional element to this Court's analysis; and fifth, what effects on interstate commerce are simply too attenuated to support the exercise of Commerce Clause power. These conflicts in rationale provide the Court with a needed opportunity to clarify the Commerce Clause analysis it set forth in *Lopez* and *Morrison*, and thus warrant certiorari here.

A. The Fifth Circuit Has Explicitly Rejected The D.C. Circuit's View That A Regulation Of Endangered Species Is "Economic" Whenever It Is Applied To An Economic Actor.

Applying the same decisions of this Court in *Lopez* and *Morrison* that the D.C. Circuit ostensibly applied below, the

Fifth Circuit explicitly rejected the claim, adopted by the D.C. Circuit below, that federal regulation of non-commercial species is permissible if the activity constituting the "take" is itself economic:

> Neither the plain language of the Commerce Clause, nor judicial decisions construing it, suggest that, concerning substantial effect *vel non*, Congress may regulate activity (here, Cave Species takes) solely because non-regulated conduct (here, commercial development) by the actor engaged in the regulated activity will have some connection to interstate commerce.... To accept [such an] analysis would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors. There would be no limit to Congress' authority to regulate interstate activities, so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce.

GDF Realty, 326 F.3d, at 634-35.

The species at issue here, the arroyo toad, is not the subject of commercial activity. As such, the Service's actions prohibiting the "take" of arroyo toads are not aimed at activity that is necessarily economic in nature, and are therefore not authorized under the Commerce Clause, even if some of the activity engaged in by Rancho Viejo is economic, and even if some of the activity engaged in by Rancho Viejo qualifies as interstate commerce.

Not only did the D.C. Circuit reach a different conclusion, it derided Rancho Viejo's claimed facial challenge to the extension of the ESA to wholly intrastate, non-commercial species as Rancho Viejo "wanting to have its cake and eat it too." Pet. App. 25a. Yet the Fifth Circuit fully grasped, and accepted, the parallel claim by GDF Realty: "[A]t issue is whether ESA's take provision is unconstitu-

tional *as applied* to six species of subterranean invertebrates found only within two counties in Texas." *GDF Realty, Inc.*, 326 F.3d, at 624; *see also id.*, at 627 ("the only question is the constitutionality *vel non* of the take provision *as applied* to the Cave Species" (emphasis added)). In other words, the Fifth Circuit permitted a facial challenge to a particular application of the ESA—the "take" of specific intrastate species—and the fact that GDF Realty was itself engaged in economic activity was immaterial because the regulatory expansion of the ESA was not aimed at economic activity.

Indeed, because GDF Realty proposed to construct "a shopping center (including a Wal-Mart) ... and office buildings (commercial development)," *id.*, at 626, rather than just private homes, as Rancho Viejo has proposed, the economic activity at issue in *GDF Realty* was much more directly related to interstate commerce than the activity at issue in the present case. The district court in *GDF Realty* had held, in accord with the D.C. Circuit's decision here, that GDF Realty's commercial development "activity, standing alone, 'would easily be classified as substantially affecting interstate commerce.'" *Id.*, at 633 (quoting 169 F. Supp. 2d at 658). The Fifth Circuit expressly rejected the district court's reasoning, holding that the district court had improperly "extended the scope of [the] relevant conduct beyond [GDF Realty's] cave species takes; it *primarily* considered [GDF Realty's] commercial motivations that would underlie the takes." *Id.* The Fifth Circuit concluded instead that, consistent with this Court's Commerce Clause decisions, "the scope of inquiry is primarily whether the *expressly regulated activity* substantially affects interstate commerce, *i.e.*, whether takes, be they of the Cave Species or of all endangered species in the aggregate, have the substantial effect." *Id.*

The Fifth Circuit found its analysis consistent with *SWANCC*, in which this Court, albeit in *dictum*, noted that aggregation based on the nature of the actor, rather than on

the activity that was the object of the regulation, would "raise significant constitutional questions." 531 U.S., at 173-74. Following this Court's admonition in *SWANCC* that it is necessary "to evaluate the precise object or activity that, in the aggregate, substantially effects interstate commerce," and this Court's focus on the activity "to which the statute *by its terms* extends," *id.*, the Fifth Circuit looked only to the specific regulated activity—"takes"—and not the commercial nature of the actor undertaking that activity.

The D.C. Circuit, relying on the very same passage from *SWANCC*, drew just the opposite conclusion, holding that the "precise activity" to be considered was Rancho Viejo's planned commercial development. Pet. App. 16a. While Rancho Viejo believes that the Fifth Circuit's view is the better reading of *SWANCC*, at the very least there is a great deal of confusion among the circuits with respect to the aggregation principle, warranting this Court's review.

The Fifth Circuit also expressly disavowed the D.C. Circuit's holding in *NAHB* (followed by the D.C. Circuit in the case at bar) and the Fourth Circuit's holding in *Gibbs*, to the extent those holdings looked to the "nature of the actor's general conduct" rather than the specific activity actually regulated by the ESA's "take" provisions. Again, the explicit split in rationales warrants this Court's attention.

B. The Circuit Courts Are Split On How This Court's Decision In *Salerno* Applies To Commerce Clause Cases After *Lopez*.

Another manifestation of this conflict between the D.C. and Fifth Circuits is in how the two courts addressed this Court's pre-*Lopez* decision in *Salerno*. As Judge Roberts noted in his dissent from the denial of the petition for rehearing en banc, "the approach [regarding *Salerno*] of the panel in this case and *NAHB* now conflicts with the opinion of a sister circuit—a fact confirmed by that circuit's quotation from the *NAHB* dissent." *See* Pet. App. 37a (Roberts, J., dis-

senting from denial of petition for rehearing en banc) (quoting *GDF Realty*, 326 F.3d, at 636 (quoting *NAHB*, 130 F.3d, at 1067 (Sentelle, J., dissenting))).

The D.C. Circuit relied upon *Salerno* despite the obvious inconsistency between *Salerno* and *Lopez*. The Fifth Circuit, in contrast, rejected the applicability of *Salerno* in the post-*Lopez* Commerce Clause context:

> [L]ooking primarily beyond the regulated activity [i.e., beyond the "take" of endangered species, to commercial development that is only indirectly regulated by the ESA] in such a manner would "effectually obliterate" the limiting purpose of the Commerce Clause. *Jones & Laughlin Steel Corp.*, 301 U.S. at 37. Concomitantly, the facial challenges in *Lopez* and *Morrison* would have failed. For instance, regulation of gun possession near schools, at issue in *Lopez*, would arguably pass constitutional muster as applied to a possessor who was a significant gun salesman. Therefore, § 922(q)(1)(A) could not have been facially unconstitutional. *See Salerno*, 481 U.S. at 745. Similarly, the Violence Against Women Act, at issue in *Morrison*, would arguably have been a constitutional exercise of Congressional power if it were used to prosecute a person who committed violence against women and then sold a substantial number of videotapes of the encounter in interstate markets. It too would have withstood a facial attack. Such results, of course, run contrary to *Lopez* and *Morrison*.

GDF Realty, 326 F.3d, at 635-36.

In holding that GDF Realty's own nature as a commercial developer was not sufficient for the Commerce Clause analysis, the Fifth Circuit found dispositive from *Lopez* the fact that Alfonso Lopez brought his gun to school for sale. The D.C. Circuit, in contrast, dismissed that fact, contending

that because it was not mentioned in the Supreme Court's own *Lopez* opinion, "the Supreme Court attached no significance to it." Pet. App. 17a; *see also Nebraska v. E.P.A.*, 331 F.3d 995, 998 and n.2 (D.C. Cir. 2003) (adhering to the *Salerno* analysis adopted in *Rancho Viejo*).

But that is just the point. While hugely significant under the D.C. Circuit's *Salerno* analysis, the fact that Alfonso Lopez brought his gun to school *to sell*—an obvious commercial motivation on the part of the actor—had no significance for the Supreme Court in *Lopez* or the Fifth Circuit in *GDF Realty* precisely because "neither the purposes nor the design *of the statute* ha[d] an evident commercial nexus." *Morrison*, 529 U.S., at 611 (quoting *Lopez*, 514 U.S., at 580 (Kennedy, J., concurring)) (emphasis added). A recent decision of the Ninth Circuit reached the same conclusion (albeit with respect to a different statute):

> [T]he regulation [banning possession of machine-guns] does not have an economic purpose .... More likely, section 922(o) was intended to keep machine-guns out of the hands of criminals—an admirable goal, but not a commercial one.

United States v. Stewart, No. 02-10318, 2003 WL 22671036, *4 (9th Cir., Nov. 13, 2003).

The purpose and design of the Gun Free Schools Zone Act at issue in *Lopez*—protecting school zones—did not change merely because the particular person prosecuted was engaged in a commercial action. Neither does the ESA's purpose and design of protecting endangered species (as applied to non-commercial species) change merely because some of Rancho Viejo's planned activities were economic in nature. Because the D.C. Circuit's failure to accept this important distinction, grounded in this Court's decision in *Lopez*, is fundamentally and explicitly at odds with the Fifth Circuit's treatment of the issue, this Court's review is warranted.

C. The D.C. Circuit's Decision Permitting Aggregation of Non-Economic Activity Conflicts With The Decisions Of Several Other Circuits.

The two circuit courts also disagree over the application of this Court's aggregation principle. While the D.C. Circuit aggregated all of the activity engaged in by the regulated litigant, the Fifth Circuit held that "[i]n light of *Lopez* and *Morrison* the key question for purposes of aggregation is whether the nature of the regulated activity is economic." 326 F.3d, at 630. This was important, according to the Fifth Circuit, lest the Commerce Clause be stripped of all limits:

> Whether and how Congress may apply the aggregation principle are controversial questions. The pitfalls are apparent. For example, any imaginable activity of mankind can affect the alertness, energy, and mood of human beings, which in turn can affect their productivity in the workplace, which when aggregated together could reduce national economic productivity. Such reasoning would eliminate any judicially enforceable limit on the Commerce Clause, *thereby turning that clause into what it most certainly is not, a general police power.*

Id., at 629 (emphasis in original) (quoting *United States v. Ho*, 311 F.3d 589, 599 (5th Cir. 2002)).

The Fifth Circuit recognized that this Court in "*Morrison* noted, for aggregation purposes, the importance of the economic nature of the regulated activity" when it specifically acknowledged that it had heretofore aggregated intrastate activity "*only* where the activity *is economic in nature*." *GDF Realty*, 326 F.3d, at 630 (emphasis in original) (quoting *Morrison*, 529 U.S., at 613 (emphasis added)). To allow aggregation of "noneconomic and noncommercial activity" "so long as, if aggregated," there would be "a substantial effect" on commerce, held the Fifth Circuit, "would vitiate *Lopez* and *Morrison*'s seeming requirement that the intrastate instance

of activity be commercial." 326 F.3d, at 638. "*Lopez* and *Morrison* stand against such a proposition." *Id.*

The D.C. Circuit, in contrast, relying on the identical passage from *Morrison*, implied that this Court had rejected a categorical rule, thus permitting the aggregation of non-economic activity in order to demonstrate a substantial effect on commerce. Pet. App. 15a n.10; *see also United States v. Rodia*, 194 F.3d 465, 481 (3rd Cir. 1999) ("the specific activity that Congress is regulating need not itself be objectively commercial, as long as it has a substantial effect on commerce"); *cf. United States v. Bongiorno*, 106 F.3d 1027, 1031 (1st Cir. 1997) (noting that the Court consistently has interpreted the Commerce Clause "to include transactions that might strike a lay person as 'noncommercial'").

The Fifth Circuit's position is not only a better reading of *Morrison*, but it is in accord with decisions of the First, Second, Third, Fourth, Ninth, and Eleventh Circuits as well. *See United States v. Zorilla*, 93 F.3d 7, 8 (1st Cir. 1996); *United States v. Holston*, 343 F.3d 83, 88 (2nd Cir. 2003); *Freier v. Westinghouse Electric Corp.*, 303 F.3d 176, 200-03 (2nd Cir. 2002), *cert. denied*, 123 S. Ct. 1899 (Apr. 28, 2003); *United States v. Whited*, 311 F.3d 259, 271 (3rd Cir. 2002), *cert. denied*, 123 S. Ct. 2234 (May 27, 2003); *Gibbs v. Babbitt*, 214 F.3d 483, 491 (4th Cir. 2000); *United States v. McCoy*, 323 F.3d 1114, 1119-20 (9th Cir. 2003); *United States v. Cortes*, 299 F.3d 1030, 1035 (9th Cir. 2002); *United States v. Ballinger*, 312 F.3d 1264, 1270 (11th Cir. 2002).

Because of the fundamental importance of this issue to the *Lopez* analysis, this conflict is alone sufficient to warrant this Court's review.

D. The Circuits Have Recently Split On Their Treatment Of The Jurisdictional Element.

The Circuits are also split on the significance of the jurisdictional element discussed in both *Lopez* and *Morrison*. Both the D.C. Circuit below and the Fourth and Fifth Circuits

in *Gibbs* and *GDF Realty*, respectively, have held that a jurisdictional element is not necessary to sustain Commerce Clause authority. Pet. App. 10a; *Gibbs*, 214 F.3d, at 387; *GDF Realty*, 326 F.3d, at 632-33. The Ninth Circuit, in contrast, has recently held that even having a jurisdictional element is not necessarily sufficient to sustain Commerce Clause authority.

In *United States v. McCoy*, 323 F.3d 1114 (9th Cir. 2003), the Ninth Circuit addressed the jurisdictional element in 18 U.S.C. § 2252(a)(4)(B), which makes unlawful the possession of child pornography "produced using materials which have been mailed or ... shipped or transported" in interstate commerce. *Id.*, at 1133. This jurisdictional element "provide[d] no support for the government's assertion of federal jurisdiction," held the Court. *Id.*, at 1126; *see also Stewart*, 2003 WL 226710367, at *3 (rejecting Commerce Clause authority for prosecuting possession of a homemade machinegun despite fact that some of the parts had been shipped in interstate commerce).

Thus, even had the ESA in general, or the arroyo toad listing in particular, contained a jurisdictional element limiting the federal regulatory reach to "takes" that resulted from "using materials which have been ... shipped" in interstate commerce, such would not be sufficient to sustain the exercise of Commerce Clause power under the Ninth Circuit's recent holdings. Rancho Viejo's use of such materials was more than sufficient for the D.C. Circuit, however, even absent any jurisdictional element. Pet. App. 10a-13a.

E. The Circuits Are Split On Whether The Commerce Effect of Tourism, Scholarly Articles, Scientific Travel, And Potential Future Medical Discoveries Is Too Attenuated To Sustain Commerce Clause Authority.

The Fifth Circuit in *GDF Realty* also rejected the government's claim that Cave Bugs "play a role in interstate

commerce" because "some scientists" "have traveled to Texas" to study the Cave Bugs and "articles about the Cave Bugs have been published in scientific journals." *GDF Realty*, 326 F.3d, at 637. In stark contrast, and despite the admonition by this Court in *SWANCC* that even a billion dollar bird hunting and watching tourism trade was likely too attenuated a connection to interstate commerce to sustain the government's "migratory bird" rule, 131 U.S., at 166, the D.C. Circuit below and the Fourth Circuit in *Gibbs* expressly accepted such contentions. Pet. App. 9a n. 2; *Gibbs*, 214 F.3d at 493-95.

Similarly, the Fifth Circuit in *GDF Realty* rejected as mere "conjecture" the government's claim that the potential for future medical discoveries provided a sufficient connection with interstate commerce to validate the regulation. *GDF Realty*, 326 F.3d, at 637-38. "The *possibility* of future substantial effects of the Cave Species on interstate commerce, through industries such as medicine, is simply too hypothetical and attenuated from the regulation in question to pass constitutional muster. *Id.* (citing *Morrison*, 529 U.S., at 612). The D.C. Circuit below and the Fourth Circuit in *Gibbs*, on the other hand, both accepted that conjectural rationale. Pet. App. 9a n. 2; *Gibbs*, 214 F.3d, at 494.

Conversely, the only rationale upon which the Fifth Circuit relied in *GDF Realty* to uphold the application of the ESA to wholly intrastate, non-commercial cave bugs has been rejected by the D.C. Circuit. The Fifth Circuit believed that the extension of the ESA to non-commercial species was permissible because of the potential effect on commerce that might arise from loss of a vibrant biodiversity in species. In *NAHB*, the D.C. Circuit accepted a biodiversity rationale of its own, but only in the context of total extinction cases, not, as here, in cases involving only the loss of a species in a portion of its range. Judge Wald stated in *NAHB* that the biodiversity rationale upon which she relied "provides support for the Endangered Species Act *only insofar as the Act prevents*

activities that are likely to cause the elimination of species." *NAHB*, 130 F.3d, at 1052 n. 10 (emphasis added). Thus, *NAHB*'s holding, unchanged by the D.C. Circuit in the present case, is in conflict with the Fifth Circuit on the only rationale accepted by the Fifth Circuit, a "circle of life" theory that might be good fodder for Disney's "The Lion King," but which would utterly destroy the distinction between "truly national and truly local" that this Court has adamantly sought to maintain.

CONCLUSION

Certiorari is necessary here to address fundamental elements of this Court's post-*Lopez* Commerce Clause analysis, in the specific context of whether Congress has the authority to regulate wholly intrastate, non-commercial species, and the local activities that impact their habitats. Accordingly, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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DATED: November 19, 2003

Appendix A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 12, 2002
Decided April 1, 2003

No. 01-5373

RANCHO VIEJO, LLC,
APPELLANT

v.

GALE A. NORTON,
SECRETARY OF THE INTERIOR, *ET AL.*,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 00cv02798)

John C. Eastman argued the cause for appellant. With him on the briefs were *Hugh Hewitt*, *Steven B. Imhoof*, *John W. Wilmer, Jr.*, and *Gregory D. Russell*.

M. Reed Hopper and *Anne M. Hayes* were on the brief for *amicus curiae* Pacific Legal Foundation in support of reversal.

Katherine J. Barton, Attorney, U.S. Department of Justice, argued the cause for appellees. With her on the brief were *Ellen J. Durkee* and *Seth M. Barsky*, Attorneys. *David C. Shilton*, Attorney, entered an appearance.

Before: GINSBURG, *Chief Judge*, and EDWARDS and GARLAND, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GARLAND.

Concurring opinion filed by *Chief Judge* GINSBURG.

GARLAND, *Circuit Judge*: Rancho Viejo is a real estate development company that wishes to construct a 202-acre housing development in San Diego County, California. The United States Fish and Wildlife Service determined that Rancho Viejo's construction plan was likely to jeopardize the continued existence of the arroyo southwestern toad, which the Secretary of the Interior has listed as an endangered species since 1994. Rather than accept an alternative plan proposed by the Service, Rancho Viejo filed suit challenging the application of the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, to its project as an unconstitutional exercise of federal authority under the Commerce Clause. The district court dismissed the suit. We conclude that this case is governed by our prior decision in *National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), and therefore affirm.

I

The Endangered Species Act (ESA), 16 U.S.C. §§ 1531 *et seq.*, is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). Finding that "various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation," 16 U.S.C. § 1531(a)(1), Congress passed the ESA "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," *id.* § 1531(b).

The ESA directs the Secretary of the Interior to list fish, wildlife, or plant species that she determines are endangered or threatened. 16 U.S.C. § 1533(a). Section 9 of the Act makes it unlawful to "take" any such listed species without a permit. *Id.* § 1538(a)(1)(B). "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or

collect, or to attempt to engage in any such conduct." *Id.* § 1532(19). The Secretary has promulgated, and the Supreme Court has upheld, a regulation that defines "harm" as including "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding." 50 C.F.R. § 17.3; *see Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 708 (1995) (sustaining 50 C.F.R. § 17.3 as a reasonable interpretation of 16 U.S.C. § 1532(19)).

Section 7 of the ESA requires all federal agencies to ensure that none of their activities, including the granting of licenses and permits, will "jeopardize the continued existence of any endangered species . . . or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical." *Id.* § 1536(a)(2). When an agency concludes that its activities may adversely affect a listed species, it must engage in a formal consultation with the Interior Department's Fish and Wildlife Service (FWS). 50 C.F.R. § 402.14; *see* 16 U.S.C. § 1536(a)(2). Where applicable, such consultations result in the issuance of a Biological Opinion that includes a "jeopardy" or "no jeopardy" determination. 50 C.F.R. § 402.14(h)(3); *see* 16 U.S.C. § 1536(b)(4). If the FWS decides that the proposed action is likely to "jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat," the opinion must set forth "reasonable and prudent alternatives," if any, that will avoid such consequences. 50 C.F.R. § 402.14(h)(3); *see* 16 U.S.C. § 1536(b)(3)(A).

The Secretary listed the arroyo toad as an endangered species on December 16, 1994. *See* Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for the Arroyo Southwestern Toad, 59 Fed. Reg. 64,859 (codified at 50 C.F.R. pt. 17). The toads live in scattered populations from California's Monterey County in the

north to Mexico's Baja California in the south. *Id.*; Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for the Arroyo Toad, 66 Fed. Reg. 9414 (Feb. 7, 2001) (codified at 50 C.F.R. pt. 17). They breed in shallow, sandy, or gravelly pools along streams, and spend most of their adult lives in upland habitats. 66 Fed. Reg. at 9415. The toads range no farther than 1.2 miles from the streams where they breed, and none in the area at issue in this case travel outside the state of California. *Id.* Habitat destruction has driven the toad from approximately 76% of its former California range. *Id.* at 9414.

Plaintiff Rancho Viejo plans to build a 280-home residential development on a 202-acre site in San Diego County. The property is bordered on the south by Keys Creek, a major tributary of the San Luis Rey River, and is just east of Interstate 15. FWS, Biological/Conference Opinion on the Rancho Viejo Residential Development at 8, 26 (Aug. 24, 2000). The company's construction plan is to build homes in an upland area of approximately 52 acres, and to use an additional 77 acres of its upland property and portions of the Keys Creek streambed as a "borrow area" to provide fill for the project. Rancho Viejo wants to remove six feet or more of soil from the surface of the borrow area, amounting to approximately 750,000 cubic yards of material, and to transport that soil to the 52-acre housing site to the north. Joint Stip. ¶ 2. Surveys of Keys Creek have confirmed the presence of arroyo toads on and adjacent to the project site. *Id.* ¶ 7.

Because Rancho Viejo's plan would involve the discharge of "fill into waters of the United States, including wetlands," Biological/Conference Opinion at 8, the company was required by section 404 of the Clean Water Act, 33 U.S.C. § 1344, to obtain a permit from the U.S. Army Corps of Engineers (the "Corps"). *See id.* § 1344(a). The Corps determined that the project "may affect" the arroyo toad population in the area, 5 and sought a formal consultation with the FWS pursuant to ESA § 7.

In May 2000, Rancho Viejo excavated a trench and erected a fence, each running parallel to the bank of Keys Creek. Arroyo toads were observed on the upland side of the fence. Joint Stip. ¶ 8. In the FWS's view, the fence has prevented and may continue to impede movement of the toads between their upland habitat and their breeding habitat in the creek. *Id.* ¶ 9. On May 22, the FWS informed Rancho Viejo that construction of the fence "has resulted in the illegal take and will result in the future illegal take of federally endangered" arroyo toads "in violation of the Endangered Species Act." May 22, 2000 Letter at 1; Joint Stip. ¶ 10.

In August 2000, the FWS issued a Biological Opinion that determined that excavation of the 77-acre borrow area would result in the taking of arroyo toads and was "likely to jeopardize the continued existence" of the species. Biological/ Conference Opinion at 35; *see* Joint Stip. ¶ 14. Pursuant to ESA § 7(b)(3)(A) and 50 C.F.R. § 402.02, the FWS proposed an alternative that would, without jeopardizing the continued existence of the toad, allow Rancho Viejo to complete its development by obtaining fill dirt from off-site sources instead of from the proposed borrow area. Joint Stip. ¶ 14; Biological/Conference Opinion at 37.

Rancho Viejo neither removed the fence nor adopted the FWS's proposed alternative. Instead, it filed a complaint in the United States District Court for the District of Columbia against the Secretary of the Interior and other federal defendants, alleging that the listing of the arroyo toad as an endangered species under the ESA, and the application of the ESA to Rancho Viejo's construction plans, exceeded the federal government's power under the Commerce Clause. *See* U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States. . . .").

The parties filed cross motions for summary judgment. In ruling on those motions, the district court noted that this circuit had only recently sustained, against a Commerce 6 Clause challenge, a determination by the FWS that hospital

construction in San Bernardino County, California would likely lead to the take of the Delhi Sands Flower-Loving Fly in violation of the ESA. *See National Ass'n of Home Builders v. Babbitt* ("*NAHB*"), 130 F.3d 1041 (D.C. Cir. 1997). Holding that Rancho Viejo's case was indistinguishable from *NAHB*, and finding nothing in subsequent Supreme Court opinions to cast doubt on that decision, the court granted the government's motion.[1]

II

We review the district court's grant of summary judgment de novo, *United Seniors Ass'n v. Shalala*, 182 F.3d 965, 969 (D.C. Cir. 1999), and in so doing accord the ESA a "presumption of constitutionality," *United States v. Morrison*, 529 U.S. 598, 607 (2000). In this Part, we first discuss the *NAHB* decision, focusing particularly on the Supreme Court opinion that provided that case's analytic framework, *United States v. Lopez*, 514 U.S. 549 (1995). We then consider the application of *NAHB* and *Lopez* to the complaint filed by Rancho Viejo. In Part III, we examine Rancho Viejo's argument that Supreme Court opinions issued after this court decided *NAHB* have deprived that decision of its precedential force.

A

In *Lopez*, the Supreme Court considered whether a provision of the Gun-Free School Zones Act, 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V), which made it a federal offense to possess a firearm near a school, exceeded Congress'

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[1] In the district court, the government contended that the case was not ripe for review. The court rejected that contention, and we agree that plaintiff has satisfied the requirements of ripeness. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998). On appeal, the government does not reassert its ripeness contention, but does argue that the suit should be dismissed because there has been no final agency action. It is clear, however, that the FWS's Biological Opinion relating to plaintiff's proposed development project constitutes final agency action. *See Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

authority under the Commerce Clause. 514 U.S. at 551. The Court held that the clause authorizes Congress to regulate "three broad categories of activity":

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.

Id. at 558–59 (citations omitted). With respect to the third category, the Court discussed four factors that led it to conclude that the activities regulated by the Gun-Free School Zones Act did not substantially affect interstate commerce.

First, the Court said, "the possession of a gun in a school zone . . . has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 514 U.S. at 560–61. Second, the Court observed that the Act "has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." *Id.* at 562. Third, *Lopez* noted that, "[a]lthough as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, . . . neither the statute nor its legislative history contains express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone." *Id.* (internal citations, quotations, and alterations omitted). Finally, the Court determined that the relationship between gun possession and interstate commerce was simply too "tenuous[ ]" to be regarded as substantial, and that if the government's arguments were accepted, the Court

would be "hard pressed to posit any activity by an individual that Congress is without power to regulate." *Id.* at 564.

In *NAHB*, this circuit applied *Lopez* in a case challenging the application of the ESA to a construction project in an area that contained the habitat of the Delhi Sands Flower- Loving Fly. 130 F.3d at 1043 (Wald, J.). The fly, an endangered species, is found in only two counties, both in California. *Id.* One of those counties reported to the FWS that it planned to construct a hospital and power plant on a site occupied by the fly, and to expand a highway intersection in connection with that work. *Id.* at 1044–45. The FWS informed the county that the expansion of the intersection would likely lead to a take of the fly in violation of section 9 of the ESA. *Id.* at 1045. Thereafter, the county filed suit against the Secretary of the Interior, contending that application of the ESA in those circumstances exceeded the authority of the federal government under the Commerce Clause.

A majority of the *NAHB* court held that the take provision of ESA § 9, and its application to the facts of that case, constituted a valid exercise of Congress' commerce power. 130 F.3d at 1042, 1057 (Wald, J.); *id.* at 1057 (Henderson, J., concurring). The court found that application of the ESA fell within the third *Lopez* category, concluding that the regulated activity "substantially affects" interstate commerce. In so holding, the majority agreed upon two rationales: (1) "the loss of biodiversity itself has a substantial effect on our ecosystem and likewise on interstate commerce"; and (2) "the Department's protection of the flies regulates and substantially affects commercial development activity which is plainly interstate." *Id.* at 1058 (Henderson, J., concurring); *see id.* at 1046 n.3, 1056 (Wald, J.). Examining those two rationales within the context of *Lopez*'s four factors, the *NAHB* court concluded that application of the ESA to the county's proposed construction project was constitutional. *Id.* at 1042, 1057 (Wald, J.); *id.* at 1057 (Henderson, J., concurring). Because the second *NAHB* rationale readily resolves this case, it

is the focus of the balance of our discussion.[2]

B

Secretary Norton argues, and the district court concluded, that application of the four *Lopez* factors leads to the same result here as it did in *NAHB*. We agree. The first *Lopez* factor is whether the regulated activity has anything "to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 514 U.S. at 561; *accord Morrison*, 529 U.S. at 610. The regulated activity at issue in *NAHB*—the construction of a hospital, power plant, and supporting infrastructure—was plainly an economic enterprise. As Judge Henderson observed, "the Department's protection of the flies regulates and substantially affects commercial development activity." *NAHB*, 130 F.3d at 1058; *see id.* at 1056 (Wald, J.) ("[T]he case at hand involves a regulation of the conditions under which commercial activity takes place."). The same is true here, where the regulated activity is the construction of a 202- acre commercial housing development.

Second, the court must consider whether the statute in question contains an "express jurisdictional element." *Lopez*, 514 U.S. at 561–62; *accord Morrison*, 529 U.S. at 611–12.

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[2] In focusing on the second *NAHB* rationale, we do not mean to discredit the first. Nor do we mean to discredit rationales that other circuits have relied upon in upholding endangered species legislation. We simply have no need to consider those other rationales to dispose of the case before us. *See, e.g.*, *Gibbs v. Babbitt*, 214 F.3d 483, 497 (4th Cir. 2000) ("The protection of the red wolf on both federal and private land substantially affects interstate commerce through tourism, trade, scientific research, and other potential economic activities."); *United States v. Bramble*, 103 F.3d 1475, 1477, 1481 (9th Cir. 1996) (upholding the Bald and Golden Eagle Protection Act's prohibition on the possession of eagle feathers, *see* 16 U.S.C. § 668(a), because "[e]xtinction of the eagle would substantially affect interstate commerce by foreclosing any possibility of several types of commercial activity," including "future commerce in eagles," "future interstate travel for the purpose of . . . studying eagles," "or future commerce in beneficial products derived . . . from analysis of their genetic material").

Section 9 of the ESA has no express jurisdictional hook that limits its application, for example, to takes "in or affecting commerce." *Lopez* did not indicate that such a hook is required, however, and its absence did not dissuade the 10 *NAHB* court from finding application of the ESA constitutional.[3] Nor did it dissuade the Fourth Circuit from finding a similar application of the ESA constitutional in *Gibbs v. Babbitt*, 214 F.3d 483, 487 (4th Cir. 2000). Indeed, all of the circuits that have addressed the question since *Lopez* (as well as those that have considered the matter since *Morrison*) have concluded that the absence of an express jurisdictional element is not fatal to a statute's constitutionality under the Commerce Clause.[4] Rather, in a case like this, "[t]he absence of such a jurisdictional element simply means that courts must determine independently whether the statute regulates activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affect[ ] interstate commerce." *United States v. Moghadam*, 175 F.3d 1269, 1276 (11th Cir. 1999) (internal quotation marks omitted).

The third *Lopez* factor looks to whether there are "express congressional findings" or legislative history "regarding the effects upon interstate commerce" of the regulated activity. *Lopez*, 514 U.S. at 561–62. There are no such findings or history with respect to the specific rationale that we rely upon here, the effect of commercial housing construction on inter-

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[3] Nor did *Morrison*, discussed below, make an express jurisdictional element necessary. *See* 529 U.S. at 612 (stating only that such an element "may establish that the enactment is in pursuance of Congress' regulation of interstate commerce").

[4] *See, e.g.*, *Norton v. Ashcroft*, 298 F.3d 547, 557 (6th Cir. 2002); *Groome Res. Ltd. v. Parish of Jefferson*, 234 F.3d 192, 211 (5th Cir. 2000); *United States v. Moghadam*, 175 F.3d 1269, 1275–76 (11th Cir. 1999); *United States v. Bird*, 124 F.3d 667, 675 (5th Cir. 1997); *see also* Appellant's Reply Br. at 8 (acknowledging that "the lack of a jurisdictional element may not be dispositive").

state commerce.[5] But neither findings nor legislative history is necessary.[6] As *Lopez* acknowledged, "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce." *Id.* at 562; *accord Morrison*, 529 U.S. at 612. Rather, such evidence merely "enable[s] [the court] to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye." *Lopez*, 514 U.S. at 563; *accord Morrison*, 529 U.S. at 612. As we discuss in the remainder of this section, the naked eye requires no assistance here.

The fourth *Lopez* factor is whether the relationship between the regulated activity and interstate commerce is too attenuated to be regarded as substantial. *See Lopez*, 514 U.S. at 563–67; *accord Morrison*, 529 U.S. at 612. Although Rancho Viejo avers that the effect on interstate commerce of preserving endangered species is too tenuous to satisfy this test, it does not argue that the effect of commercial construction projects is similarly attenuated. Because the rationale upon which we rely focuses on the activity that the federal government seeks to regulate in this case (the construction of Rancho Viejo's housing development), and because we are required to accord congressional legislation a "presumption of constitutionality," *Morrison*, 529 U.S. at 607, plaintiff's failure to demonstrate (or even to argue) that its project and those like it are without substantial interstate effect is fatal to its cause.

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[5] There is ESA legislative history that supports the other primary rationale relied upon in *NAHB* — the effect of the loss of biodiversity on interstate commerce. *See NAHB*, 130 F.3d at 1050 (Wald, J.). There are also express findings and legislative history indicating that Congress enacted the ESA out of concern that land development and habitat modification were leading to species extinction and had to be controlled by federal legislation. *See infra* Part III.B.

[6] *See, e.g., Gibbs*, 214 F.3d at 493 n.3; *Moghadam*, 175 F.3d at 1275.

This conclusion is not diminished by the fact that the arroyo toad, like the Flower-Loving Fly, does not travel outside of California, or that Rancho Viejo's development, like the San Bernardino hospital, is located wholly within the state. *See NAHB*, 130 F.3d at 1043–44 (Wald, J.) (noting that the fly has an eight-mile radius, limited to California alone). As Judge Henderson said in *NAHB*, the regulation of commercial land development, quite "apart from the characteristics or range of the specific endangered species involved, has a plain and substantial effect on interstate commerce." *Id.* at 1059. There, "the regulation relate[d] to both the proposed redesigned traffic intersection and the hospital it [was] intended to serve, each of which ha[d] an obvious connection with interstate commerce." *Id.* (Henderson, J., concurring); *accord id.* at 1048, 1056 (Wald, J.). Here, Rancho Viejo's 202-acre project, located near a major interstate highway, is likewise one that "is presumably being constructed using materials and people from outside the state and which will attract" construction workers and purchasers "from both inside and outside the state." *Id.* at 1048 (Wald, J.).[7]

This analysis is perfectly consistent with *Lopez*. In that case, the Court noted that it had "upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce." 514 U.S. at 559. Such conclusions were often based upon viewing "regulations of activities that arise out of or are connected with a commercial transaction . . . in the aggregate." *Id.* at 561.[8] To survive

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[7] Application of the ESA to habitat degradation has a further impact on interstate commerce by removing the incentives for states "to adopt lower standards of endangered species protection in order to attract development," thereby preventing a destructive "race to the bottom." *NAHB*, 130 F.3d at 1054–56 (Wald, J.); *see infra* Part III.D.

[8] The cases cited by the Court include: *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), which *Lopez* described as involving "the regulation of intrastate coal mining"; *Perez v. United States*,

Commerce Clause review, all the government must establish is that "a rational basis exist[s] for concluding that a regulated activity sufficiently affect[s] interstate commerce." *Id.* at 557. And there can be no doubt that such a relationship exists for costly commercial developments like Rancho Viejo's.[9] As Judge Henderson made clear in *NAHB*, "[i]nsofar as application of section 9(a)(1) of [the] ESA . . . acts to regulate commercial development of the land inhabited by the endangered species, 'it may . . . be reached by Congress' because 'it asserts a substantial economic effect on interstate commerce.'" 130 F.3d at 1059–60 (quoting *Lopez*, 514 U.S. at 556 (quoting *Wickard v. Filburn*, 317 U.S. 111, 125 (1942))).

III

Rancho Viejo does not seriously dispute that *NAHB* is indistinguishable from this case. Rather, plaintiff argues that, as a result of subsequent Supreme Court decisions in *United*

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402 U.S. 146 (1971), which addressed congressional regulation of "intrastate extortionate credit transactions"; *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), which reviewed the application of Title II of the Civil Rights Act of 1964 to "inns and hotels catering to interstate guests"; and *Katzenbach v. McClung*, 379 U.S. 294 (1964), a case involving application of the same statute to "the regulation of . . . restaurants utilizing substantial interstate supplies." *Lopez*, 514 U.S. at 559–60.

[9] For example, in *McClung*, cited with approval in *Lopez*, 514 U.S. at 559, the Court upheld application of Title II of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a *et seq.*, to a local restaurant. 379 U.S. at 303–05. The Court found the application of the statute to be within Congress' commerce power because the restaurant bought 46% of its food, costing approximately $70,000, from a local supplier who obtained it from outside of the state. *Id.* at 296, 298. In part, the *McClung* Court relied on the fact that the amount of food the restaurant procured from out of state, " 'taken together with that of many others similarly situated,' " was " 'far from trivial.' " *Id.* at 301 (quoting *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942)). *Cf. Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 744 (1976) (holding that a conspiracy against a North Carolina hospital had "a substantial effect on interstate commerce," and hence was covered by the Sherman Act, because it could, inter alia, reduce the hospital's purchases of out-of-state medicines and supplies).

States v. Morrison, 529 U.S. 598 (2000), and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("*SWANCC*"), 531 U.S. 159 (2001), *NAHB* is no longer "good law." Appellant's Br. at 9. Before considering plaintiff's argument in detail, we explain why the nature of the Supreme Court's analysis in those decisions makes it highly unlikely that they undermine our circuit precedent.

In *Morrison*, the Court considered a challenge to a section of the Violence Against Women Act, 42 U.S.C. § 13981, which provided a federal civil remedy for victims of gender motivated violence. Concluding that the case was "controlled by our decision[ ] in *United States v. Lopez*," the Court held that Congress lacked authority to enact the provision under the Commerce Clause. *Morrison*, 529 U.S. at 602. *Lopez*, of course, is the case that controlled this court's decision in *NAHB*. Accordingly, because *NAHB* was based upon *Lopez*, and because *Morrison* made clear that "*Lopez* ... provides the proper framework for conducting the required analysis," *id.* at 609, it would be quite surprising if *Morrison* undermined our decision in *NAHB*. *See Norton v. Ashcroft*, 298 F.3d 547, 556 (6th Cir. 2002) ("Rather than breaking new Commerce Clause ground, *Morrison* derived its four-factor framework directly from *Lopez*.").

Rancho Viejo's reliance on *SWANCC* is even further from the mark. In that case, the Supreme Court held, as a matter of statutory construction, that an abandoned gravel pit that provided habitat for migratory birds did not constitute "navigable waters" within the meaning of the Clean Water Act, 33 U.S.C. § 1344(a), and hence was beyond the regulatory authority of the Army Corps of Engineers. 531 U.S. at 167, 171–72. Although the petitioner in *SWANCC* also asked the Court to decide whether Congress *could* exercise such authority under the Commerce Clause if it chose to do so, the Court expressly declined to reach that question. *Id.* at 162. As Rancho Viejo notes, the Court did indicate that if it were to consider the constitutionality of such an exercise, it "would

have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce." *Id.* at 173 (quoted in Appellant's Br. at 17). But as we discuss below, identifying the "precise activity" at issue in Rancho Viejo's case only strengthens the conclusion that the take provision of the ESA can constitutionally be applied to plaintiff's construction project.

A

Plaintiff's principal argument is that, although *Lopez* made clear that the first of its four factors was whether the object of regulation was "economic activity," 514 U.S. at 559, *Morrison* "reaffirmed and elaborated upon" that factor in a way that undercuts this circuit's opinion in *NAHB*. Appellant's Br. at 14. We agree that *Morrison* reaffirmed and elaborated upon the first factor, but we see nothing in *Morrison*'s discussion to suggest any dissatisfaction with the way the Court treated the factor in *Lopez*, and hence nothing to undercut our prior reliance on that case. To the contrary, *Morrison* largely proceeded by quoting and paraphrasing *Lopez*'s analysis. *See, e.g.*, 529 U.S. at 610 (noting that in *Lopez*, the Court "observed that § 922(q) was 'a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms' " (quoting *Lopez*, 514 U.S. at 561)).

Rancho Viejo contends that *Morrison* stands for the proposition that whether the regulated activity is economic is not simply a factor in the analysis, but instead is outcome determinative: that noneconomic activity, whatever its *effect* on interstate commerce, cannot be regulated under the Commerce Clause.[10] Although plaintiff acknowledges that *Morrison* expressly "declined to 'adopt a categorical rule against

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[10] *But see Terry v. Reno*, 101 F.3d 1412, 1417 (D.C. Cir. 1996) (holding, post-*Lopez* but pre-*Morrison*, that "[t]he regulated activity . . . need not be commercial, so long as its effect on interstate commerce is substantial").

aggregating the effects of any noneconomic activity' because a categorical rule was unnecessary to the outcome of that case," it argues that the Court "came pretty close" to adopting such a rule. Appellant's Reply Br. at 4 (quoting *Morrison*, 529 U.S. at 613). Because the arroyo toad is not itself "the subject of commercial activity," *id.* at 15, Rancho Viejo argues that regulation of the toad fails *Morrison*'s (and *Lopez*'s) first factor.

But how close the Court came to embracing plaintiff's view is irrelevant to the disposition of this appeal, because the ESA *regulates takings, not toads.*[11] *Morrison* instructs that "the proper inquiry" is whether the challenge is to "a *regulation of activity* that substantially affects interstate commerce." 529 U.S. at 609 (emphasis added). Similarly, *SWANCC* declares that what is required is an evaluation of "*the precise object or activity* that, in the aggregate, substantially affects interstate commerce." 531 U.S. at 173 (emphasis added). When, as directed, we turn our attention to the precise activity that is regulated in this case, there is no question but that it is economic in nature.

That regulated activity is Rancho Viejo's planned commercial development, not the arroyo toad that it threatens. The ESA does not purport to tell toads what they may or may not do. Rather, section 9 limits the taking of listed species, and its prohibitions and corresponding penalties apply to the persons who do the taking, not to the species that are taken. *See* 16 U.S.C. § 1538(a)(1), (a)(1)(B) (making it "unlawful *for any person . . . to take* any such species") (emphasis added); *id.* § 1540 (providing civil and criminal penalties for "[a]ny person who knowingly violates" the ESA). In this case, the prohibited taking is accomplished by commercial construction, and the unlawful taker is Rancho Viejo.

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[11] *See* Oral Arg. Tr. at 5 (acknowledgment by plaintiff's counsel that "the regulated activity here [is] the taking of an Arroyo Toad").

Nothing in the facts of *Morrison* or *Lopez* suggests that focusing on plaintiff's construction project is inappropriate or insufficient as a basis for sustaining this application of the ESA. Both of those cases involved the regulation of purely noneconomic activity: the statute in *Morrison* regulated gender- motivated violence; the one in *Lopez* regulated gun possession. *See, e.g.*, *Morrison*, 529 U.S. at 610 (noting that "the noneconomic, criminal nature of the conduct at issue was central to our decision in" *Lopez*). Although Rancho Viejo argues that, in fact, the *Lopez* defendant had brought the gun to school in order to sell it, one can examine the Supreme Court's opinion with a microscope without learning that fact. It appears only in the lower court's opinion, *see United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993), and the Supreme Court attached no significance to it. To the contrary, *Morrison* describes *Lopez* as a case in which "neither the actors nor their conduct ha[d] a commercial character, and neither the purposes nor the design of the statute ha[d] an evident commercial nexus." 529 U.S. at 611 (quoting *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring)).

Here, by contrast, both the "actor," a real estate company, and its "conduct," the construction of a housing development, have a plainly commercial character. So too does the "design" of the statute: the ESA seeks in part to regulate "economic growth and development untempered by adequate concern and conservation," which, Congress found, had the consequence of rendering "various species . . . extinct." 16 U.S.C. § 1531(a)(1). As Judge Henderson wrote in *NAHB*: "It is plain, then, that . . . the Congress contemplated protecting endangered species through regulation of land and its development, which is precisely what the Department has attempted to do here. Such regulation, apart from the characteristics or range of the specific endangered species involved, has a plain and substantial effect on interstate commerce."

130 F.3d at 1059.[12]

B

Rancho Viejo suggests that even if the regulated activity here is the taking of the toads through economic activity, that fact still does not end the matter. Although the ESA may *regulate* economic activity, plaintiff insists that the statute has a noneconomic *purpose*: the preservation of biodiversity, and, in this case, the preservation of toads that Rancho Viejo maintains are without commercial value. Asserting that to survive Commerce Clause scrutiny a statute must be aimed at economic activity and not simply regulate it for some other purpose, Rancho Viejo concludes that the ESA (at least as applied to its project) must fall. This argument suffers from a number of serious defects. First, the ESA, like many statutes, has multiple purposes. Whether or not economic considerations were the primary motivation for the Act, there is no question that the commercial value of preserving species diversity played an important role in Congress' deliberations. As Judge Wald described in *NAHB*, "[t]he Committee Reports on the ESA reveal that one of the primary reasons that Congress sought to protect endangered species from 'takings' was the importance of the continuing availability of a wide variety of species to interstate commerce." 130 F.3d at 1050. Likewise, the Fourth Circuit has noted that "[c]ommittee reports and legislative debates have emphasized the importance of endangered species to interstate commerce." *Gibbs*, 214 F.3d at 494 n.3.

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[12] In *United States v. Ho*, the Fifth Circuit applied a similar analysis in affirming, against a Commerce Clause challenge, the conviction of a contractor who violated asbestos work practice standards promulgated under the Clean Air Act. 311 F.3d 589, 601–04 (5th Cir. 2002). Focusing on "the regulated intrastate activity, asbestos removal," *id.* at 602, rather than on "the effects of interstate pollution," *id.* at 602 n.12, the court concluded that asbestos removal "is very much a commercial activity in today's economy," *id.* at 602.

Thus, to use a "noneconomic purpose" test to overturn a multi-purpose statute like the ESA, we would have to do so on the ground that economic concerns were not the Act's "true" or "primary" motivation. Such an enterprise is fraught with both difficulty and danger, *see Michael M. v. Super. Ct.*, 450 U.S. 464, 469–70 (1981) (plurality opinion of Rehnquist, J.); *United States v. O'Brien*, 391 U.S. 367, 382– 86 (1968), and the Supreme Court has therefore permitted inquiry into legislative purpose in only a narrow class of cases, *see City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 377–78 & n.6 (1991).[13] The enterprise is difficult because distilling the true or primary legislative purpose out of the motivations of 435 representatives and 100 senators is inherently problematic. And it is that difficulty that makes the project a dangerous one — dangerous because the indeterminacy of outcome leaves courts open to the charge that they have manipulated the determination of purpose in order to achieve their own policy preferences, and because rejecting a stated congressional purpose as "untrue" reflects considerable disrespect for the pronouncements of a democratically elected branch of government. Is the ESA's true purpose to preserve the economic potential of species whose commercial value we cannot now foresee, or did Congress regard species protection as a moral imperative? Was the Occupational Safety and Health Act enacted to spare the country the loss of productivity occasioned by workplace injury, or to protect the lives of American workers for their own sake? Did Congress pass the Clean Air and Clean Water Acts out of concern that pollution hurts the economy, or out of a fundamental concern

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[13] In *City of Columbia*, Justice Scalia noted that the Court has probed governmental motivation "only in the 'very limited and welldefined class of cases where the very nature of the constitutional question requires [this] inquiry.' " 499 U.S. at 378 n.6 (quoting *O'Brien*, 391 U.S. at 383 n.30). As an example of a case in that limited class, he cited *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 268 & n.18 (1977), a case involving "race-based motivation." 499 U.S. at 378 n.6.

for the health of the citizenry? For courts to insist on making these kinds of determinations a prerequisite for upholding the validity of congressional legislation is a recipe for judicial intervention in the political process.

Moreover, the Supreme Court has long held that Congress may act under the Commerce Clause to achieve noneconomic ends through the regulation of commercial activity. The first case in this line is *Champion v. Ames*, in which the Court upheld the constitutionality of a statute prohibiting the interstate transportation of lottery tickets, notwithstanding that Congress passed the statute "for the protection of public morals." 188 U.S. 321, 355–57 (1903). "We should hesitate long," the Court said, "before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end." *Id.* at 357–58. Ten years later, citing *Champion*, the Court rejected a Commerce Clause attack on the Mann Act, which prohibited the transportation of women in interstate commerce "for immoral purposes." *Hoke v. United States*, 227 U.S. 308, 317, 320 (1913). The Court rejected the defendant's claims that the act was "a subterfuge and an attempt to interfere with the police power of the states to regulate the morals of their citizens." *Id.* at 321. "[T]he powers reserved to the states *and* those conferred on the nation," the Court said, "are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral." *Id.* at 322 (emphasis added).

The Supreme Court briefly departed from this line in *Hammer v. Dagenhart*, enjoining, on Commerce Clause grounds, the enforcement of a 1916 federal statute excluding the products of child labor from interstate commerce. 247 U.S. 251, 277 (1918). Over Justice Holmes' dissent, the Court held the statute unconstitutional because "[t]he thing intended" was not regulation of "transportation among the states," but rather "standardiz[ation] [of] the ages at which children may be employed in mining and manufacturing." *Id.*

at 271– 72. But *Hammer* was expressly overruled in *United States v. Darby*, in which the Court upheld the Fair Labor Standards Act's prohibition on the shipment in interstate commerce of products produced by employees whose wages or hours did not conform to the Act's requirements. 312 U.S. 100, 116–17 (1941). "The motive and purpose of a regulation of interstate commerce," the Court declared, "are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control." *Id.* at 115.

Since then, the Supreme Court has never held an exercise of Congress' commerce power unconstitutional on the ground that the legislature had a noneconomic purpose. Perhaps the most important of the subsequent cases is *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261–62 (1964), in which the Court rebuffed a Commerce Clause attack on Title II of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a *et seq.* The Court acknowledged that "[t]he Senate Commerce Committee made it quite clear that the fundamental object of Title II was to vindicate the deprivation of personal dignity that 21 surely accompanies denials of equal access to public establishments." *Id.* at 250 (internal quotation marks omitted). But the fact that Congress passed the statute to attack the moral outrage of racial discrimination did not lead the Supreme Court to find it unconstitutional. To the contrary, citing several of the cases discussed above, the Court held that the fact "[t]hat Congress was legislating against moral wrongs . . . render[s] its enactments no less valid." *Id.* at 257; *see id.* at 256–57.

The position urged by Rancho Viejo puts the constitutionality of many of the above-described statutes at risk. And they are hardly the only ones. Congress' primary object in passing product safety legislation, for example, was not to improve the productivity of industry but rather to protect the

well-being of the public.[14] Much the same can be said of federal environmental legislation.[15] And plaintiff's position would make federal criminal law an area of particular vulnerability. Surely statutes proscribing the use or possession of explosives, of weapons of mass destruction, and of firearms by convicted felons, were not passed merely (or even primarily) to protect commercial property — but to protect lives.[16] Nor did Congress bar the murder of public safety officers because it was concerned about the economic impact of their deaths,[17] or the shipment of child pornography because it thought that the market for such materials was suboptimal.[18]

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[14] *See, e.g.*, Consumer Product Safety Act, 15 U.S.C. § 2051(b)(1) (declaring that the first purpose of the Act is "to protect the public against unreasonable risks of injury associated with consumer products"); National Traffic and Motor Vehicle Safety Act of 1966, 49 U.S.C. § 30101 (stating that "the purpose of this chapter is to reduce traffic accidents and deaths and injuries resulting from traffic accidents").

[15] *See, e.g.*, *Hodel v. Indiana*, 452 U.S. 314, 329 (1981) (noting that "Congress adopted the Surface Mining Act in order to ensure that production of coal for interstate commerce would not be at the expense of agriculture, the environment, or public health and safety").

[16] *See, e.g.*, Homeland Security Act of 2002, Pub. L. No. 107-296, § 1123, 116 Stat. 2135, 2283–85 (amending 18 U.S.C. § 842(i), which had prohibited certain categories of persons from receiving or possessing any explosive that has been shipped "in interstate commerce," by inserting "or affecting" before "interstate"); 18 U.S.C. § 2332a (making it unlawful to use a weapon of mass destruction against any person within the United States where the results of such use "affect interstate . . . commerce"); *id.* § 844(o) (barring the transfer of explosive materials with knowledge that they will be used to commit a crime of violence); *id.* § 922(g) (making it unlawful for a convicted felon to possess a firearm "in or affecting commerce").

[17] *See, e.g.*, 18 U.S.C. § 844(d) (setting penalties for receiving an explosive in interstate commerce with intent to kill or injure, where injury or death results to any person, including a public safety officer.)

[18] *See, e.g.*, 18 U.S.C. § 2252A (criminalizing the transportation of child pornography in interstate commerce); *see also United States v. Kallestad*, 236 F.3d 225, 228 (5th Cir. 2000) (upholding a federal statute prohibiting

It is true that Congress has tied the application of many of these statutes to jurisdictional hooks. But there are many other criminal statutes that are not so tied. *See, e.g.*, 21 U.S.C. § 841(a) & (b)(1)(A)(iv) (making it unlawful to possess with intent to distribute 100 grams of PCP). Moreover, as we have noted above, a jurisdictional element is not critical to a statute's constitutionality as long as there is other evidence that interstate commerce is substantially affected. *See supra* Part II.B. Rancho Viejo offers no reason to regard a noneconomic purpose as acceptable if tied to a jurisdictional hook, but unacceptable if effectuated — as it is here — through the direct regulation of commercial activity.[19]

There is nothing in *Morrison* or *Lopez* to put the *Champion/ Hoke/Darby/Heart of Atlanta* line of precedent in doubt. Indeed, both decisions repeatedly cite *Darby* and *Heart of Atlanta*. *See, e.g.*, *Morrison*, 529 U.S. at 609, 610, 614; *Lopez*, 514 U.S. at 555, 556, 557, 558, 559. *Morrison* did overturn a statute that was passed with a moral purpose: protecting women against violent crime. But unlike the ESA, the Violence Against Women Act sought to achieve its objective by regulating an activity — gender-motivated violence — that the Court found was not "in any sense of the phrase,

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the possession of child pornography on the ground of substantial effect on interstate commerce).

[19] Similarly, it is also true that the cases in the *Champion/ Hoke/Darby/Heart of Atlanta* line can be described as falling within the first *Lopez* category — the regulation of the use of the channels of interstate commerce. *See Morrison*, 529 U.S. at 609 (citing *Darby* and *Heart of Atlanta* as examples of that category of cases). But the demarcation between the *Lopez* categories is far from clear. For example, the Court has repeatedly referred to *Heart of Atlanta* (and its companion case, *Katzenbach v. McClung*) as also falling within the third category — the regulation of activities having a substantial relation to interstate commerce. *See Morrison*, 529 U.S. at 610; *Lopez*, 514 U.S. at 559. Moreover, Rancho Viejo again proffers no reason why it would be permissible for Congress to have a noneconomic purpose when regulating the use of the channels of interstate commerce but impermissible when regulating activities having a substantial relation to interstate commerce.

economic activity." *Morrison*, 529 U.S. at 613. Similarly, the Gun-Free School Zones Act sought to achieve its noneconomic purpose — the preemption of potential gun violence near schools — by regulating conduct, "[t]he possession of a gun in a local school zone," that was "in no sense an economic activity." *Lopez*, 514 U.S. at 573–74 (quoted in *Morrison*, 529 U.S. at 610). Thus, neither case precludes the conclusion that it is constitutional to apply the ESA to a commercial construction project like Rancho Viejo's. And a court must hesitate before extending those two cases, neither of which involved economic regulation of any kind, to require the unraveling of a vast fabric of Supreme Court precedent and congressional legislation.

C

Rancho Viejo next argues that even if the taking regulated in this case is commercial in character, the ESA bans other takings that are not. Because the ESA's prohibition on takings applies as much to a hiker's "casual walk in the woods" as to the commercial activities of a real estate company, Rancho Viejo contends that the statute cannot constitutionally be applied to its taking of arroyo toads. Appellant's Reply Br. at 5. Plaintiff's "overbreadth" argument is unavailing.

In *Lopez*, the Supreme Court noted that "where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence." 514 U.S. at 558 (emphasis omitted) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968)). Hence, because much activity regulated by the ESA does bear a substantial relation to commerce, it may well be that the hiker hypothetical proffered by the plaintiff is "of no consequence" to the statute's constitutionality. *See Hodel v. Indiana*, 452 U.S. 314, 329 n.17 (1981) ("A complex regulatory program . . . can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional

goal. It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies [the Commerce Clause] test.").[20]

But we need not decide that question here because there is a more basic answer to Rancho Viejo's hiker hypothetical: it is not this case. Plaintiff characterizes its complaint as "fundamentally . . . an as-applied challenge to the constitutionality of the Defendants' regulation of the 'taking' of Arroyo toads under the ESA." Complaint ¶ 2. And as we have already discussed, the particular application before us involves the regulation of Rancho Viejo's commercial real estate development, which falls well within the powers granted Congress under the Commerce Clause.

At oral argument, Rancho Viejo asserted that it has a different kind of "as-applied" challenge in mind. Plaintiff's objection, it said, is not confined to the application of the ESA to its development project, but "to the listing of this particular endangered species," the arroyo toad. Oral Arg. Tr. at 5. In effect, plaintiff explained, "[w]e are facially challenging the listing of the arroyo toad." *Id.* at 20. But this curious characterization is simply the plaintiff's attempt to have its cake and eat it too. The company would like us to consider its challenge to the ESA only as applied to the arroyo toad, which it says has no "known commercial value" — unlike, for example, Mark Twain's celebrated jumping frogs of Calaveras County. Appellant's Reply Br. at 9; *see* Appellant's Br. at 20–21. Yet it would also like us to regard that narrow challenge as a facial one, unconstrained by the fact that plaintiff is a commercial developer.

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[20] It may also be that application of the ESA to hikers or toad hunters can be sustained on the other rationale relied on in *NAHB*, "that the loss of biodiversity itself has a substantial effect on our ecosystem and likewise on interstate commerce." 130 F.3d at 1058 (Henderson, J., concurring); *see Gibbs*, 214 F.3d at 497 (citing *NAHB*).

This artificially constructed "facial" challenge must fail. As the Supreme Court held in *United States v. Salerno*, to mount a successful facial challenge, "the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the . . . Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." 481 U.S. 739, 745 (1987).[21] Because Rancho Viejo's own case represents a "set of circumstances" under which the ESA may constitutionally be applied — even to the lowly arroyo toad — plaintiff cannot shoulder the "heavy burden" required to prevail in a facial challenge. *Id.* In effect, Rancho Viejo seeks to trade the shoes of a commercial developer for those of a weekend hiker. But permitting plaintiff to stand in the hiker's shoes would mean recognizing the kind of overbreadth challenge the Supreme Court has expressly forsworn.

Before leaving this point, we further note that the constitutional circumstances we rely on here — takings by commercial developers — are neither an unintended nor an insignificant portion of the activities regulated by the ESA. In that statute, "Congress expressly found that 'economic growth and development untempered by adequate concern and conservation' was the cause for 'various species of fish, wildlife, and plants in the United States hav[ing] been rendered extinct.' " *NAHB*, 130 F.3d at 1059 (Henderson, J., concurring)

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[21] *See S.D. Myers, Inc. v. City & County of San Francisco*, 253 F.3d 461, 467 (9th Cir. 2001) (applying *Salerno* to a Commerce Clause challenge and holding that the plaintiff "must establish that no set of circumstances exists under which the [challenged ordinance] would be valid" (internal quotation marks omitted)); *United States v. Sage*, 92 F.3d 101, 106 (2d Cir. 1996) (same); *see also AMFAC Resorts v. U.S. Dep't of Interior*, 282 F.3d 818, 826 (D.C. Cir. 2002) (noting that this circuit has repeatedly "invoked *Salerno*'s no-set-of-circumstances test to reject facial constitutional challenges"), *cert. granted on other grounds sub nom. Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 123 S.Ct. 549 (2002).

(quoting 16 U.S.C. § 1531(a)(1)). Moreover, as Secretary Norton points out, "the activities that cause the loss of endangered species and that are regulated by the take prohibition are themselves generally commercial and economic activities." Appellees' Br. at 34. Finally, in listing the arroyo toad as an endangered species, the FWS specifically found that "[d]evelopment projects in riparian wetlands have caused permanent losses of riparian habitats and are the most conspicuous factor in the decline of the arroyo toad." 59 Fed. Reg. at 64,863. Because Congress has constitutional authority to regulate such development projects, Rancho Viejo's complaint fails regardless of whether it is characterized as an as-applied or facial challenge.

D

Finally, Rancho Viejo draws our attention to *Morrison*'s declaration that "[t]he Constitution requires a distinction between what is truly national and what is truly local." 529 U.S. at 617–18. Plaintiff argues that the ESA represents an unlawful assertion of congressional power over local land use decisions, which it describes as an area of traditional state regulation. The ESA, however, does not constitute a general regulation of land use.[22] Far from encroaching upon territory that has traditionally been the domain of state and local government, the ESA represents a national response to a specific problem of "truly national" concern.

In making these points, we can do little to improve upon the Fourth Circuit's opinion in *Gibbs*, which upheld, as a valid exercise of federal power under the Commerce Clause, an FWS regulation that limited the taking of red wolves. 214 F.3d at 487. As Chief Judge Wilkinson explained, regulation

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[22] *Cf. California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 587 (1987) (stating that "the core activity described by" land use planning and environmental regulation "is undoubtedly different," because "environmental regulation . . . does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits").

of the taking of endangered species "does not involve an 'area of traditional state concern,' one to which 'States lay claim by right of history and expertise.' " *Id.* at 499 (quoting *Lopez*, 514 U.S. at 580, 583 (Kennedy, J., concurring)). Rather, as the Supreme Court acknowledged in *Minnesota v. Mille Lacs Band of Chippewa Indians*, "[a]lthough States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers." 526 U.S. 172, 204 (1999). Moreover, while "states and localities possess broad regulatory and zoning authority over land within their jurisdictions, . . . [i]t is well established . . . that Congress can regulate even private land use for environmental and wildlife conservation." *Gibbs*, 214 F.3d at 500. Tracing a hundred-year history of congressional involvement in natural resource conservation, Chief Judge Wilkinson concluded that "it is clear from our laws and precedent that federal regulation of endangered wildlife does not trench impermissibly upon state powers." *Id.* at 500–01.

The Fourth Circuit also recognized the national scope of the problem posed by species conservation. Citing the ESA's legislative history, the court noted Congress' concern that " 'protection of endangered species is not a matter that can be handled in the absence of coherent national and international policies: the results of a series of unconnected and disorganized policies and programs by various states might well be confusion compounded.' " *Gibbs*, 214 F.3d at 502 (quoting H.R. REP. NO. 93-412, at 7 (1973)). As the *Gibbs* court explained: "States may decide to forego or limit conservation efforts in order to lower these costs, and other states may be forced to follow suit in order to compete." *Id.* at 501. Our court has recognized this problem as well. *See NAHB*, 130 F.3d at 1055 (Wald, J.) (noting that states may be "motivated to adopt lower standards of endangered species protection in order to attract development"). And the Supreme Court, as the Fourth Circuit observed, "has held that Congress may

take cognizance of this dynamic and arrest the 'race to the bottom' in order to prevent interstate competition whose overall effect would damage the quality of the national environment." *Gibbs*, 214 F.3d at 501 (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981)).[23]

For these reasons, the protection of endangered species cannot fairly be described as a power "which the Founders denied the National Government and reposed in the States." *Morrison*, 529 U.S. at 618. Rather, "the preservation of endangered species is historically a federal function," *Gibbs*, 214 F.3d at 505, and invalidating this application of the ESA "would call into question the historic power of the federal government to preserve scarce resources in one locality for the future benefit of all Americans," *id.* at 492. We therefore agree with Chief Judge Wilkinson that to sustain challenges of this nature "would require courts to move abruptly from preserving traditional state roles to dismantling historic federal ones." *Id.* at 504.

IV

"Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *Morrison*, 529 U.S. at 607 (citations omitted). Rancho Viejo has not made that "plain showing" here. Rather, its attack on the constitutionality of

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[23] *See Hodel v. Virginia Surface Mining*, 452 U.S. at 268, 281–82 (rejecting a claim that the Surface Mining Control and Reclamation Act exceeds Congress' Commerce Clause power because it regulates local land use, noting that the Act responds to congressional concern that "nationwide 'surface mining and reclamation standards are essential in order to insure that competition in interstate commerce . . . will not be used to undermine the ability of the several States to improve and maintain adequate standards,' " and holding that "[t]he prevention of this sort of destructive interstate competition is a traditional role for congressional action under the Commerce Clause" (quoting 30 U.S.C. § 1201(g))).

the application of the ESA to its commercial housing development is indistinguishable from the attack we turned back in *NAHB*, and nothing in subsequent Supreme Court jurisprudence has undermined the precedential authority of that decision. Accordingly, *NAHB* controls our decision in this case, and the district court's grant of summary judgment in favor of Secretary Norton is therefore

Affirmed.

GINSBURG, *Chief Judge*, concurring:

Although I do not disagree with anything in the opinion of the court, I write separately because I do not believe our opinion makes clear, as the Supreme Court requires, that there is a logical stopping point to our rationale for upholding the constitutionality of the exercise of the Congress's power under the Commerce Clause here challenged. *See Lopez*, 514 U.S. at 564 ("if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate"); *Morrison*, 529 U.S. at 615-16; *see also United States v. Wall*, 92 F.3d 1444, 1455-56 (6th Cir. 1996) (Boggs, J., dissenting in part) ("the rationale offered to support the constitutionality of the statute . . . has a logical stopping point, so that the rationale is not so broad as to regulate on a similar basis all human endeavors, especially those traditionally regulated by the states").

In this case I think it clear that our rationale for concluding the take of the arroyo toad affects interstate commerce does indeed have a logical stopping point, though it goes unremarked in the opinion of the court. Our rationale is that, with respect to a species that is not an article in interstate commerce and does not affect interstate commerce, a take can be regulated if – but only if – the take itself substantially affects interstate commerce. The large-scale residential development that is the take in this case clearly does affect in-

terstate commerce. Just as important, however, the lone hiker in the woods, or the homeowner who moves dirt in order to landscape his property, though he takes the toad, does not affect interstate commerce.

Without this limitation, the Government could regulate as a take any kind of activity, regardless whether that activity had any connection with interstate commerce. With this understanding of the rationale of the case, I concur in the opinion of the court.

Appendix B

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed On: July 22, 2003

No. 01–5373

RANCHO VIEJO, LLC,
APPELLANT

v.

GALE A. NORTON,
SECRETARY OF THE INTERIOR, ET AL.,
APPELLEES

BEFORE: GINSBURG, *Chief Judge*, and EDWARDS, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL, GARLAND, and ROBERTS, *Circuit Judges*.

ORDER

Appellant's petition for rehearing en banc and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular, active service did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk
BY: /s
Michael C. McGrail
Deputy Clerk

Circuit Judge SENTELLE and *Circuit Judge* ROBERTS would grant the petition for rehearing en banc.

Separate statements of *Circuit Judge* SENTELLE and *Circuit Judge* ROBERTS dissenting from the denial of rehearing en banc are attached.

SENTELLE, *Circuit Judge, dissenting from denial of rehearing en banc*: The court's opinion in this case continues a divergence from contemporary Supreme Court Commerce Clause jurisprudence begun, or at least evidenced, in *National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (*NAHB*). Indeed, it broadens that divergence. At least at the time of *NAHB*, the Supreme Court had not yet entered its decision in *United States v. Morrison*, 529 U.S. 598 (2000), underlining and explaining its decision in *United States v. Lopez*, 514 U.S. 549 (1995). This time we uphold the order of the Fish and Wildlife Service to a developer to remove a fence from its own property in order to accommodate the movement of arroyo toads, a species of neither migratory habit nor commercial use. Thus, as in *NAHB*, this Circuit holds that the intrastate "taking" of a noncommercial species of fauna may be constitutionally regulated by the federal government under the authority of the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, which empowers Congress "[t]o regulate Commerce . . . among the several states. . . ."

Once again, this Circuit upholds under the rubric of the interstate commerce power the regulation of "an activity that is neither interstate nor commerce. . . ." *NAHB*, 130 F.3d at 1061 (Sentelle, J., dissenting). As in *NAHB*, the panel's reasoning runs athwart the Supreme Court's analysis of the reach of the Commerce Clause in *Lopez*, and now in *Morrison*. Under the *Lopez* analysis, Congress may regulate (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things

in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities having a substantial relation to interstate commerce." *Lopez*, 514 U.S. at 558–59 (citations omitted). The arroyo toad is not a channel of commerce nor is it in one. It is not an instrumentality of commerce, nor is it a person or thing in interstate commerce. The "taking" of that toad (especially by land preparation) does not have any substantial relationship to interstate commerce. The protection of a non-commercial, purely local toad is not within any of the *Lopez* categories.

As I understand the court's rationale in the present opinion, because the "taking" of the toad is done by an entity engaging in commercial activity, Congress can regulate that taking under the third category. I disagree. In analyzing the parameters of the third category in *Lopez*, the Supreme Court examined whether:

> —the regulation controls a commercial activity, or an activity necessary to the regulation of some commercial activity;
> —the statute includes a jurisdictional nexus requirement to ensure that each regulated instance of the activity affects interstate commerce; and
> —the rationale offered to support the constitutionality of the statute (*i.e.*, statutory findings, legislative history, arguments of counsel, or a reviewing court's own attribution of purposes to the statute being challenged) has a logical stopping point so that the rationale is not so broad as to regulate on a similar basis all human endeavors, especially those traditionally regulated by the states.

NAHB, 130 F.3d at 1064 (Sentelle, J., dissenting) (citing *Lopez*, 514 U.S. at 559–65; other citations omitted). Protecting a toad from a land owner pinning a fence on its own property does not become commercial under any of the three elements of that examination. The point of *Lopez*, as further explained in *Morrison*, is not that Congress can regulate any activity if the act of regulating catches an entity or an action that is it-

self commercial independent of the noncommercial nature of the regulated entity and activity. It is rather that "'[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.'" *Morrison*, 529 U.S. at 610 (quoting *Lopez*, 514 U.S. at 560). As the *Morrison* Court went on to explain, "a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case," the decision to strike down the Gun–Free School Zones Act as beyond the reach of the Commerce Clause. *Id.* Despite the valiant efforts of my colleagues on the panel, the notion that the rationale of the present decision has a stopping point fails. It is at odds, most importantly, with the Supreme Court. It is also conspicuously in conflict with another circuit. The Fifth Circuit has explicitly rejected the claim that federal regulation protecting a noncommercial species is permissible if the activity constituting the "take" was itself economic.

> Neither the plain language of the Commerce Clause, nor judicial decisions construing it, suggest that, concerning substantial effect *vel non*, Congress may regulate activity (here, Cave Species takes) solely because non-regulated conduct (here, commercial development) by the actor engaged in the regulated activity will have some connection to interstate commerce. . .T To accept [such an] analysis would allow application of otherwise unconstitutional statutes to commercial actors, but not to noncommercial actors. There would be no limit to Congress' authority to regulate intrastate activities, so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce.

GDF Realty Inv., *Ltd. v. Norton*, 326 F.3d 622, 634 (5th Cir. 2003).

In fact, even if it were constitutionally sufficient that the take, although not required by the terms of the statute, coin-

cidentally constituted activity in interstate commerce, that does not match the facts of this case. Ground preparation and erection of a fence are not commerce, and certainly not interstate. Even the construction of houses hardly constitutes interstate commerce. In short, because this decision of the court continues a line of cases in conflict with Supreme Court jurisprudence, and is in conflict with at least one other circuit, I would en banc this cause so that the full court might bring the jurisprudence of the Circuit in harmony with the Supreme Court.

ROBERTS, *Circuit Judge, dissenting from denial of rehearing en banc*: The panel's opinion in effect asks whether the challenged *regulation* substantially affects interstate commerce, rather than whether the *activity* being regulated does so. Thus, the panel sustains the application of the Act in this case because Rancho Viejo's commercial development constitutes interstate commerce and the regulation impinges on that development, not because the incidental taking of arroyo toads can be said to be interstate commerce. *See Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1071–73.

Such an approach seems inconsistent with the Supreme Court's holdings in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000). The Court in those cases upheld facial Commerce Clause challenges to legislation prohibiting the possession of firearms in school zones and violence against women. Given *United States v. Salerno*, 481 U.S. 739 (1987), such a facial challenge can succeed only if there are no circumstances in which the Act at issue can be applied without violating the Commerce Clause. Under the panel's approach in this case, however, if the defendant in *Lopez* possessed the firearm because he was part of an interstate ring and had brought it to the school to sell it, or the defendant in *Morrison* assaulted his victims to promote interstate extortion, then clearly the challenged *regulations* in those cases would have substantially affected interstate commerce, and the facial Commerce

Clause challenges would have failed.

That is precisely what the Fifth Circuit concluded recently in rejecting the approach the panel took in this case. *See GDF Realty Inv., Ltd. v. Norton*, 326 F.3d 622, 634–35 (5th Cir. 2003). As the Fifth Circuit explained, "looking primarily beyond the regulated activity . . .would 'effectually obliterate' the limiting purpose of the Commerce Clause," and, under such an approach, "the facial challenges in *Lopez* and *Morrison* would have failed." *Id.*

The panel's approach in this case leads to the result that regulating the taking of a hapless toad that, for reasons of its own, lives its entire life in California constitutes regulating "Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3. To be fair, the panel faithfully applied *National Association of Home Builders v. Babbitt,* 130 F.3d 1041 D.C. Cir. 1997). En banc review is appropriate because the approach of the panel in this case and *NAHB* now conflicts with the opinion of a sister circuit – a fact confirmed by that circuit's quotation from the *NAHB* dissent. *See GDF Realty*, 326 F.3d at 636 (quoting *NAHB*, 130 F.3d at 1067 (Sentelle, J., dissenting)). Such review would also afford the opportunity to consider alternative grounds for sustaining application of the Act that may be more consistent with Supreme Court precedent. *See Rancho Viejo, LLC v. Norton*, 323 F.3d at 1067–68 n.2.

Appendix C

United States District Court
District of Columbia

RANCHO VIEJO, LLC, *Plaintiff*, v. Gale A. NORTON, Secretary of the Interior, *et al.*, *Defendants*.	**No. CIV.A.1:00CV02798 (ESH)** JOINT STIPULATION OF FACTS

By and through undersigned counsel, and solely for the purpose of resolving this specific litigation through summary judgment, Plaintiff and Defendants hereby stipulate to the following facts:

1. Plaintiff, Rancho Viejo, LLC ("Rancho Viejo"), is a California real estate development company located in Solana Beach, San Diego County, California. Rancho Viejo owns certain property in northern San Diego County, California, adjacent to Keys Creek that it proposes to develop as a residential housing project (the "Property").

2. Rancho Viejo proposes to construct approximately 280 homes within an upland area of approximately 52 acres on a 202-acre Property adjacent to Keys Creek. Rancho Viejo proposes to utilize an additional upland area of 77 acres and portions of Keys Creek as a borrow area to extract fill for the 52 acre construction area, dedicate 50 acres of upland habitat as a preserve area, and enhance the existing 20 acre lake complex. Rancho Viejo has also proposed to utilize some portion of the Project site as a wetland mitigation bank

for the San Diego County and surrounding areas. The County and various regulatory agencies have not agreed to this mitigation banking proposal. Grading within the borrow area would occur on both sides of Keys Creek, as well as within the active creek channel in order to provide fill material for the residential housing area and raise the houses out of the 100 year floodplain. Rancho Viejo has proposed to excavate approximately 6 or more feet (in depth) of soil off the surface of the 77 acre borrow area (approximately 750,000 cubic yards of material) and transport that soil to the 52 acre housing site to the north. Approximately 3 acres of Keys Creek channelized during the Interstate 5 construction would be lined with buried rip rap. This development program may hereinafter be referred to as the Project.

3. On May 21, 1999, Rancho Viejo filed an application with the U.S. Army Corps of Engineers (the "Corps") to obtain a permit under Section 404 of the Clean Water Act ("CWA") for authorization to conduct work on the Project falling within the Corps' jurisdiction.

4. The Service, pursuant to the ESA, proposed endangered species status for the Arroyo southwestern toad *(Bufo microscaphus californicus)* ("Arroyo toad") on August 3, 1993. See 58 Fed. Reg. 41,231. The Service issued its final rule determining that the Arroyo toad was an endangered species under the ESA on December 16, 1994 (the "Final Rule"). See 59 Fed. Reg. 64,859. The text of the Final Rule does not contain express findings concerning the Arroyo toad's connection to interstate commerce.

5. In a letter dated July 9, 1999, and pursuant to Section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. §1531 *et seq.*, the Corps requested a formal consultation with the United States Fish and Wildlife Service ("Service") on Rancho Viejo's application. That consultation was requested because the Corps determined that the Project may affect, among other wildlife, the Arroyo toad—a federally-listed endangered species.

6. The Service has published in the Federal Register that arroyo toads occur within the State of California and in northwestern Baja California, Mexico. 66 Fed. Reg. 9,414-15 (February 7, 2001). The Tijuana River and Tecate Creek span the border of Mexico and California. Tecate Creek and Cottonwood Creek are tributaries to the Tijuana River. The Service believes that arroyo toads have been observed in both the Tijuana River and Cottonwood Creek within 1 km of the border. Although the Service is unaware of any surveys that have been conducted on the Mexico side of the border within these drainages, given the close proximity of the breeding locations, the Service believes, based upon the best available scientific information, that the toads migrate across the border in this river valley. See Recovery Plan map figure 1; Jennings and Hays 1994; Welsh 1988.

7. Based on biological studies of the arroyo toad, the arroyo toad utilizes creek bed areas for breeding, but during the rest of the season, the arroyo toad migrates away from the creeks to sandy upland areas up to 1.2 miles from the streams where they breed. 66 Fed. Reg. 9,414-15 (Feb. 7, 2001). See also Griffin et al 1999; Holland 1998; Holland 2000. Arroyo toad surveys for breeding toads in the Keys Creek confirmed the presence of arroyo toads on and adjacent to the project site, including surveys conducted by Rancho Viejo consultants. Keys Creek is approximately 55 miles from the Mexican/California border.

8. On or about May 10, 2000, as part of the development project, Rancho Viejo constructed a fence on an upland portion of the Property. That fence is located approximately 50 feet from the downstream portion of Keys Creek and is approximately 100 feet from the riparian vegetation on the upstream portion of the Creek located within the Property. Ground disturbing work had also been done within the 52 acre portion of the project. The Service contends that on May 25, 2000, arroyo toads were observed and photographed by a FWS agent on the north upland side of the exclusionary

fence. Rancho Viejo's own consultant also observed an arroyo toad on the north (upland) side of the fence on June 11, 2000. (Letter from Mark Sudol, Environmental Solutions, Inc. to Hugh Hewitt, attached to Letter from Hugh Hewitt to FWS (June 20, 2000)).

9. The Fence as originally constructed was anchored to the ground by dirt dug from a trench along its base. Where still attached to the ground, the Service believes that the fence has prevented and may continue to impede movement of the toads between the upland habitat and their breeding habitat in the creek.

10. By letter dated May 22, 2000, the Service alleged that the construction and continued existence of the fence on the Property constituted an "illegal take" of the Arroyo toad under the ESA. That allegation subjects Rancho Viejo to potential criminal and civil liability under Section 9 of the ESA, 16 U.S.C. § 1538. Based on these allegations, the Service requested that Rancho Viejo remove the fence on its private Property and has indicated to Rancho Viejo that it may seek an enforcement action. (Letter from K. Berg dated June 16, 2000).

11. Based on Rancho Viejo's belief that no "illegal take" of the Arroyo toad has occurred or will occur in the future as a result of the construction of the subject fence, Rancho Viejo has refused the Service's request to remove the fence.

12. On May 24, 2000, after having determined that Rancho Viejo's grading permit L-011582 had expired for the 52 acre site, San Diego County issued a Notice of Violation and Stop Work Order against Rancho Viejo. Notice of Violation (May 24, 2000). San Diego County has not issued a new grading permit to Rancho Viejo.

13. On June 8, 2000, the Service proposed to designate certain lands, including the Property owned by Rancho Viejo, as critical habitats for the Arroyo toad. See 65 Fed. Reg. 36,512.

14. In August, 2000, the Service issued a jeopardy biological opinion concerning the Project. Among other findings, the Service determined that excavating 750,000 cubic yards of material and thereby stripping the surface of the 77 acre upland borrow area will result in the taking of any toads that have dispersed from the breeding areas of Keys Creek to burrows in the sandy upland areas adjacent to the creek. Nevertheless, the Service included what it believes to be a reasonable and prudent alternative that would allow development within the 52-acre portion of the property. Specifically, the Service determined that construction of houses on the 52 acre site could move forward if the dirt needed to elevate the foundations above the flood plain comes from offsite sources rather than from excavating the proposed 77 acre upland borrow/toad habitat area.

15. On February 7, 2001, the Service promulgated a final rule designating certain lands, including the Property owned by Rancho Viejo, as critical habitats for the Arroyo toad. See 66 Fed. Reg. 9,414.

Respectfully submitted,

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DATED: June 12, 2001 /s_____.

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Supreme Court, U.S.
FILED

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No. _____ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

RANCHO VIEJO, LLC,

Petitioner,

v.

GALE A. NORTON, Secretary of the Interior, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

SUPPLEMENTAL APPENDIX

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Appendix D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RANCHO VIEJO, LLC, Plaintiff, v. GALE A. NORTON, Secretary of the Interior, *et al.*, Defendants.	**Civil Action No.** **1:00-CV-02798 (ESH)**

MEMORANDUM OPINION

The arroyo toad[1] has been an endangered species since December 1994. The toad's habitat stretches from coastal Southern California, beginning in the Salinas River Basin in Monterey and San Luis Obispo Counties, to northern Baja California, Mexico. Chiefly nocturnal, a full-grown toad is two to three inches in length, and is distinguished by a V-shaped stripe across the top of its head between the eyes. Arroyo toads prefer riparian habitats with sandy streambeds; during breeding season, which typically runs from March to July, they hop up to 1.2 miles to a nearby stream or pool, where they lay and fertilize their eggs.

Plaintiff Rancho Viejo seeks to construct a housing development in northern San Diego County. Before it could develop the land, plaintiff was required to comply with certain provisions of the Endangered Species Act of 1973, 16 U.S.C. § 1531 ("ESA"). After a survey, defendants discovered that plaintiff's development would likely disturb the habitat of a group of arroyo toads in the area, in violation of

[1] *Bufo microscaphus californicus.*

the ESA, and proposed a lawful alternative under the Act. Rather than agreeing to the alternate plan, plaintiff filed this lawsuit. Rancho Viejo claims that the application of the ESA is unconstitutional because the federal government does not have the authority under the Commerce Clause to regulate private lands in order to protect the arroyo toads on those lands, because these toads live entirely within California. This argument is not a novel one. It has been considered and uniformly rejected by several circuit courts, including the D.C. Circuit, and several district courts.[2] Plaintiff has not provided any valid basis upon which to conclude that the holding of these cases has been undermined by recent Supreme Court jurisprudence interpreting Congress' power under the Commerce Clause. Accordingly, plaintiff's challenge to the ESA must fail, and summary judgment will be entered on behalf of defendants.

BACKGROUND

I. Statutory Framework

Congress enacted the ESA in 1973 based on a finding that many of the species threatened with extinction are of "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. § 1531(a)(3). To protect these species, the ESA provides for the listing of "endangered" and "threatened" species. *Id.* § 1533. Once a species is listed, specific substantive and procedural protections are accorded to that species and its habitat. *Id.* § 1536(a)(2).

Plaintiff challenges the application of § 9 of the ESA. Section 9(a)(1) forbids any person to "take any [endangered

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[2] *See, e.g., National Association of Home Builders v. Babbitt,* 130 F.3d 1041 (D.C. Cir. 1997); *Gibbs v. Babbitt,* 214 F.3d 483 (4th Cir. 2000) *United States v. Bramble,* 103 F.3d 1475 (9th Cir. 1997); *Building Industry Association of Superior California v. Babbitt,* 979 F. Supp. 893 (D.D.C.1997); *Shields v. Babbitt,* No. MO-99-CA-040, Order (W.D. Tex. July 12, 2000).

or threatened] species within the United States or the territorial sea of the United States." 16 U.S.C. § 1538(a)(1)(B). Under the statute, "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The ESA provides for civil and criminal penalties, including imprisonment, for violations of § 9(a)(1). Plaintiff also disputes the application of § 7(a)(2), which prohibits federal agencies from taking any action that is likely to "jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary ... to be critical." 16 U.S.C. § 1536(a)(2). To achieve this objective, the ESA requires the agency to consult with the relevant federal wildlife agency whenever a federal action may affect an endangered or threatened species. *E.g.*, 50 C.F.R. § 402.14(a). If the action is likely to jeopardize the continued existence of the species or adversely modify its habitat, the wildlife agency will offer a "reasonable and prudent alternative" to the action. *E.g.*, 50 C.F.R. § 402.02.

II. Factual Background

Plaintiff Rancho Viejo is a California real estate development company that seeks to construct 280 homes on property that it owns in northern San Diego County. Plaintiff plans to use 52 acres of its 202-acre property as a site for the homes. Rancho Viejo intends to designate an additional 77 acres and portions of the adjacent Keys Creek as a borrow area, proposing to excavate approximately six feet of soil off the surface and transport it to the 52-acre housing site.

On May 21, 1999, plaintiff applied for a permit under § 404 of the Clean Water Act, 33 U.S.C. § 1344, from the U.S. Army Corps of Engineers (the "Corps") for authorization to conduct work. Pursuant to § 7 of the ESA, the Corps requested a formal consultation with the U.S. Fish and Wildlife Service (the "Service"), because the Corps determined that the plaintiff's project might affect the arroyo toad, having

confirmed the presence of arroyo toads by surveys in the Keys Creek area, on and adjacent to the Rancho Viejo project site.

In May 2000, plaintiff began ground disturbing activities in the 77-acre borrow area, including the excavation of a trench and construction of a fence approximately 50 to 100 feet upland from vegetation along the bank of Keys Creek and running parallel to the stream. Investigation by both parties has confirmed the presence of arroyo toads on the upland side of the fence. According to the Service, this fence has prevented and may continue to impede movement of the toads between their upland habitat and their breeding grounds in the creek.[3] The Service therefore sent a letter dated May 22, 2000, warning plaintiff that the construction and continued existence of the fence constituted an "illegal take" of the arroyo toad under the ESA and that plaintiff could potentially be subjected to criminal and civil liability under § 9 of the ESA. Nonetheless, plaintiff refused to remove the fence. On May 24, 2000, San Diego County determined that plaintiff's grading permit had expired and issued a Notice of Violation and Stop Work Order. San Diego County has not issued a renewed grading permit, and Rancho Viejo currently has no valid grading permit for either the 52-acre site or the 77-acre borrow area.

In August 2000, pursuant to a § 7 formal consultation, the Service issued a biological opinion which found that the proposed excavation would result in a "taking" of arroyo toads that have traveled upland from the breeding areas of Keys Creek. Under § 7, the Service proposed a "reasonable and prudent alternative" to plaintiff's plan, calling for the re-

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[3] Plaintiff's expert, a wildlife biologist, disputes this point. He contends that because the upstream portion of the fence is not buried, it will allow for the passage of toads. (Pl. Motion for Summary Judgment, Ex. B, Affidavit of Ruben Ramirez ¶ 2.) Because this point is not material to whether the ESA is constitutional as applied to plaintiff, the Court need not resolve this discrepancy.

trieval of soil from off-site sources instead of the 77-acre upland borrow area that is the toad's habitat. Adherence to this "reasonable and prudent alternative" would enable Rancho Viejo to obtain the § 404 permit from the Corps. Instead, plaintiff filed this lawsuit in November 2000. Both sides have moved for summary judgment.

LEGAL ANALYSIS

I. Ripeness

The parties are in agreement that this dispute can be resolved by summary judgment, and that there are no genuine issues of material fact that need to be resolved. However, defendants argue that this action must be dismissed because it is not ripe for review. "Before a court may consider the merits of a case, the court must determine whether the case is ripe for review so that it has subject-matter jurisdiction." *Wyoming Outdoor Council v. Dombeck,* 2001 WL 359526, at *6 (D.D.C. March 27, 2001). "A case is ripe if the interests of the court and agency in postponing review until the question arises in some more concrete and final form are outweighed by the interest of those who seek relief from the challenged action's immediate and practical impact upon them." *Aulenback, Inc. v. Federal Highway Admin.,* 103 F.3d 156, 166-67 (D.C. Cir. 1997) (internal quotations omitted). The Supreme Court has established a two-pronged test for ripeness that requires a court to evaluate 1) the fitness of the issues for judicial decision and 2) the hardship to the parties of withholding court decision. *Ohio Forestry Ass'n, Inc. v. Sierra Club,* 523 U.S. 726, 733 (1998) (quoting *Abbott Laboratories v. Gardner,* 387 U.S. 136, 149 (1967)); *Cronin v. FAA,* 73 F.3d 1126, 1131 (D.C. Cir. 1996).

"Under the fitness prong of the test, we inquire into whether the disputed claims raise purely legal, as opposed to factual, questions and whether the court or the agency would benefit from postponing review until the policy in question has sufficiently crystallized." *Florida Power & Light Co. v.*

EPA, 145 F.3d 1414, 1421 (D.C. Cir. 1998) (internal quotations and citations omitted). Here, the parties agree that the disputed claims are purely legal but disagree as to whether the policy in question has sufficiently crystallized.

Defendants argue that this case is not ripe because the claims "rest[ ] upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). However, federal actors have already applied the ESA to the plaintiff by preventing Rancho Viejo from obtaining necessary permits and threatening it with criminal prosecution and civil liability.

Defendants' application of the ESA has prevented Rancho Viejo from obtaining two permits that it needs to begin construction: 1) the Corps permit to borrow fill from a portion of its property, and 2) a renewal grading permit from San Diego County. (Joint Stipulation of Facts ¶¶ 12, 14.) The Corps was unable to issue a permit because § 7 of the ESA required it to consult with the Service after concluding that the proposed development might affect the arroyo toad. *Id.* ¶ 5. In response, the Service issued a biological opinion requiring Rancho Viejo to obtain fill from off-site sources in order to obtain this necessary permit. *Id.* ¶ 14. Therefore, defendants' application of the ESA has prevented plaintiff from obtaining the § 404 permit. In addition, plaintiff has presented sufficient evidence that San Diego County has withheld a renewal grading permit at least in part because plaintiff lacks necessary federal approval. (Plaintiff's Combined Reply and Opposition, Exs. F-H.) Moreover, upon expiration of the previous grading permit, San Diego County issued a notice of violation and stop work order. (Joint Stipulation of Facts ¶ 12.) Rancho Viejo's inability to obtain the necessary permits and continue work indicates that the legal issues have crystallized.[4]

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[4] Defendants cite *New Hanover Township v. Corps of Engineers*, 992 F.2d 470 (3d Cir. 1993), which held that a claim concerning a Corps §

In addition, plaintiff has built a fence which, according to the Service, may constitute an "illegal take" of the arroyo toad. The Service wrote plaintiff a letter to that effect, and threatened plaintiff with potential criminal and civil liability under § 9 of the ESA. The Service requested that plaintiff remove the fence and indicated that it may seek an enforcement action. Defendants argue that this letter does not support plaintiff's claim of ripeness because it does not impose any binding legal obligations. However, plaintiff has demonstrated "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *KVUE, Inc., v. Moore,* 709 F.2d 922, 928 (5th Cir. 1983) (quoting *Babbitt v. United Farm Workers Nat'l Union,* 442 U .S. 289, 298 (1979)). In addition, "it is not necessary that the plaintiff expose himself to actual arrest or prosecution to be entitled to challenge the statute ...." *KVUE,* 709 F.2d at 928 (quoting *Steffel v. Thompson,* 415 U.S. 452, 459 (1974)). Rather, the threat of criminal and civil liability is sufficient. *See Steffel,* 415 U.S. at 459 (holding that plaintiff's claim was ripe because he had been warned twice and threatened with arrest).

In addition to showing that its claim is fit for review, plaintiff has demonstrated that it will suffer hardship if the court delays judicial decision. Plaintiff must demonstrate a hardship that is "immediate, direct, and significant." *Cronin,* 73 F.3d at 1133. Defendants argue that the harm feared by plaintiff is only speculative. However, plaintiff is unable to proceed with its construction because of the delay in the permitting process. Plaintiff has also been threatened with criminal prosecution.[5] Because plaintiff has satisfied both

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404 permit was not ripe because a township permit was also necessary for the project to go forward. In *New Hanover,* however, "the Corps' decision ha[d] no immediate effect on the Township." *Id.* at 472. Here, in contrast, San Diego County is awaiting federal authorization in accordance with the ESA in order to issue the renewal grading permit.

[5] Defendants argue that the Service's letter to Rancho Viejo indicating that it is in violation and may suffer criminal and civil liability does not have the status of law or establish any binding legal requirements because

prongs of the ripeness test, its claim is appropriate for judicial review.

II. Commerce Clause

A. Legal Backdrop

The United States Constitution grants Congress the power "to regulate Commerce with foreign Nations, and among the several States ...." U.S. Const. Art. I, § 8, cl. 3. The regulated activity at issue in this case is the "taking" of the arroyo toad, as defined in § 9 of the ESA, in conjunction with plaintiff's construction project. Plaintiff argues that under *United States v. Lopez,* 514 U.S. 549 (1995) (holding the Gun-Free School Zones Act unconstitutional because possession of gun in local school zone is not economic activity that substantially affects interstate commerce), and *United States v. Morrison,* 529 U.S. 598 (2000) (holding that the civil remedy provision of Violence Against Women Act did not regulate activity that substantially affected interstate commerce), the ESA as applied to the facts of this action is unconstitutional. Plaintiff contends that the ESA cannot apply to protect the arroyo toad because the regulated activity is not commercial in nature and is entirely intrastate, thus falling outside the scope of Congress' power under the Commerce Clause.

This question has already been decided in this Circuit. In *National Association of Home Builders v. Babbitt,* 130 F.3d

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it does not constitute final agency action. *See FTC v. Standard Oil Co.,* 449 U.S. 232 (1980) (holding that the FTC's issuance of a complaint did not constitute final agency action); *Cronin v. FAA,* 73 F.3d 1126 (D.C. Cir. 1996) (holding that an action challenging the Federal Aviation Administration's regulations was not ripe because the agency's procedures had not been finalized). However, whether defendants' action is "final" in the context of the Administrative Procedure Act, 5 U.S.C. § 701, is not relevant to this case. Plaintiff's claim is that the application of the ESA is unconstitutional—not that defendants have violated the APA. As the Western District of Texas noted in a similar case, "Either it is or it is not constitutional for § 9 to be applied to [plaintiff], and his civil and criminal liability ... directly hinges on the Court's determination." *Shields v. Babbitt,* No. MO-99-CA-040, Order at 13 (W.D. Tex. July 12, 2000).

1041 (D.C.Cir.1997) [hereinafter *NAHB*], the Court rejected the argument that the ESA could not be applied to a species that lived entirely within one state. In that case, the Service had determined that a proposal to redesign an intersection near a hospital might cause a "take" of the Delhi Sands Flower-Loving Fly, an endangered species that lived only in California. In this post-*Lopez* challenge, the Court upheld the ESA—and specifically the "take" provision of § 9(a)(1)—as within Congress' Commerce Clause power. Other courts have also addressed this issue and have consistently upheld the ESA as constitutional under the Commerce Clause. *Gibbs v. Babbitt,* 214 F.3d 483 (4th Cir. 2000) (upholding a regulation limiting the "taking" of red wolves on private land, issued pursuant to the ESA); *United States v. Bramble,* 103 F.3d 1475 (9th Cir. 1997) (importance of the eagle to interstate commerce); *Shields v. Babbitt,* No. MO-99-CA-040, Order (W.D. Tex. July 12, 2000) (upholding the ESA as applied to a local aquifer that was home to a variety of endangered fish and amphibians).

The Supreme Court has recognized three broad categories of activity that Congress may regulate under the Commerce Clause. *Lopez,* 514 U.S. at 558. "First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce." *Id.* at 558-59 (citations omitted). Both parties focus on only the third of these categories.[6]

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[6] Both plaintiff and defendants discuss whether this case could be addressed under a "channels of interstate commerce" analysis. In *NAHB,* Judge Wald, writing for the majority, held that the "take" provision of the ESA was related to the use of the channels of interstate commerce. "First,

B. Substantially Affects Interstate Commerce

This Court is, of course, bound by *NAHB,* which upheld an application of the "take" provision of the ESA on the grounds that the regulated activity substantially affected interstate commerce. The parallels between *NAHB* and this case are unmistakable. Plaintiffs in *NAHB* planned to construct a new hospital and redesign an intersection to improve emergency access to the hospital. However, pursuant to the ESA, the Service informed plaintiffs that redesigning the intersection would likely lead to a "taking" of the Delhi Sands Flower Loving Fly, because it would encroach on the migration corridor the Service had set up for the fly to travel from one protected area to another. *NAHB,* 130 F.3d at 1044. Similarly, the excavation of Rancho Viejo's property would likely result in the "taking" of toads that have dispersed from the breeding areas of Keys Creek to burrows in the upland areas adjacent to the creek. The Delhi Sands Fly exists only within an 8- to 10-mile radius in a single state; the arroyo toads in this action travel up to 1.2 miles entirely within California. The application of the "taking" provision to the plaintiffs and the fly in *NAHB* is virtually identical to its application to Rancho Viejo and the arroyo toad.

It is unclear whether challenges to the constitutionality of a statute under the Commerce Clause are analyzed under the usual rational basis standard, *see NAHB,* 130 F.3d at 1051, or under the more specific guidelines set forth in *Lopez* and *Morrison.* In those cases, the Supreme Court articulated four

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the prohibition against takings of an endangered species is necessary to enable the government to control the transport of the endangered species in interstate commerce. Second, the prohibition on takings of endangered animals falls under Congress' authority to keep the channels of interstate commerce free from immoral and injurious uses." *NAHB,* 130 F.3d at 1046. Neither of the other two judges on the panel, however, joined with Judge Wald in this portion of her opinion, leaving open the question of whether the ESA regulates the use of a channel of interstate commerce. This Court, however, need not address this issue because the ESA as applied in this action satisfies the "substantially affects" test.

factors to examine in determining whether a statute substantially affects commerce. The Court need not resolve which standard is determinative, however, because the "taking" provision of the ESA as applied substantially affects interstate commerce under either approach.

Rational basis review requires this Court to determine "whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." *NAHB,* 130 F.3d at 1052 (quotations and citations omitted). As the Court in *NAHB* noted, there are two bases on which Congress could rationally conclude that the intrastate activity regulated by § 9 of the ESA substantially affected interstate commerce. First, the Act protects biodiversity. *NAHB,* 130 F.3d at 1052. "The elimination of all or even some of the endangered species would have a staggering effect on biodiversity ... and, thereby, on the current and future interstate commerce that relies on the availability of a diverse array of species." *Id.; see id.* at 1058 (Henderson, J., concurring) ("I believe that the loss of biodiversity itself has a substantial effect on our ecosystem and likewise on interstate commerce."). Second, it controls the effects of interstate commerce. Because states will be "motivated to adopt lower standards of endangered species protection in order to attract development," Congress has the power to regulate in order to "prevent destructive interstate competition." *Id.* at 1054-55.

Lopez and *Morrison,* however, appear to provide an alternate standard of review for cases such as this. There, the Supreme Court set forth a four-factor test for determining whether a regulated activity substantially affects commerce. First, a court must consider whether the statute "has [ ] to do with" commerce or some sort of economic enterprise. *Morrison,* 529 U.S. at 610. "[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison,* 529 U.S. at 613. Plaintiff argues that after *Morrison, NAHB* no longer controls, because *Morrison* made

clear that the activities regulated by the ESA in this case are not economic in nature. The Court disagrees for two reasons. First, the Supreme Court limited its holding in *Morrison* to prevent Congress from regulating "noneconomic, violent criminal conduct based solely on the conduct's aggregate effect on interstate commerce." *Id.* at 617. The ESA does not regulate "violent, criminal conduct." Rather, it regulates activities that threaten endangered species, which is a subject traditionally within the federal government's province. *See Gibbs,* 214 F.3d at 497 ("Congress undoubtedly has the constitutional authority to pass legislation for the conservation of endangered species.")[7] Thus, this is not the type of action that falls within the holding of *Morrison.*[8]

Additionally, the regulated activity in question is economic in nature. In evaluating a connection to economic or commercial activity, "economic activity must be understood in broad terms," and the Court must focus on the actual activity being regulated—in this case the building of the homes. *Gibbs,* 214 F.3d at 491-92. For example, in *Gibbs,* farmers were "taking" red wolves because they feared that the animals posed a risk to their livestock and crops. The Court found that because these "takings" focused on protection of

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[7] *Gibbs* was decided after *Morrison,* and the Fourth Circuit explicitly distinguished the subject matter of the ESA from that of the statute at issue in *Morrison.* "*Lopez* and *Morrison* properly caution that States should receive judicial protection from unconstitutional federal encroachments on state matters. Yet endangered wildlife regulation has not been an exclusive or primary state function. In this way the anti- taking regulation is distinctly unlike ... the [Violence Against Women Act that was at issue in *Morrison,* which] impeded on family law and criminal matters of traditional state concern." *Gibbs,* 214 F.3d at 500.

[8] As Judge Henderson observed in *NAHB,* "[N]either the Supreme Court nor any circuit court has used *Lopez* to strike down an attempted regulation outside the criminal arena." *NAHB,* 130 F.3d at 1060 n. 7 (Henderson, J., concurring). That statement remains true today, for if *Morrison* ever addressed the issue of civil liability, it arose from "violent, criminal conduct." 529 U.S. at 599.

commercial and economic assets, the regulated activity was economic. *Id.* at 492. In *Shields,* plaintiffs sought to pump a local aquifer to irrigate their crops. This, in turn, altered the aquatic habitat of the aquifer, causing "takes" of a number of fish, amphibian, and plant species that lived there. In holding that the ESA as applied substantially affected interstate commerce, the Court found that pumping water to irrigate crops was an economic activity. *Id.* at 30. Here, Rancho Viejo's construction of 280 homes is plainly an economic activity. Plaintiff seeks to distinguish building the homes from grading the land, and argues that only the former is economic in nature, while the latter is being regulated by the ESA. However, because the grading process is a necessary precursor to building the homes and is part of the same overall construction process, both steps are inextricably intertwined and constitute an economic activity.

In addition, regulation of the arroyo toad itself is economic in nature because "[e]xtinction of [a species] would substantially affect interstate commerce by foreclosing any possibility of several types of commercial activity ...." *Bramble,* 103 F.3d at 1481. Furthermore, "[a] national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species and of interstate movement of persons, such as amateur students of nature or professional scientists who come to a state to observe and study these species ...." *Id.* (quoting *Palila v. Hawaii Dep't of Land & Natural Resources,* 471 F.Supp. 985, 994-995 (D.Haw.1979) (upholding ESA under Commerce Clause as applied to intrastate Palila bird)). Defendants have provided evidence that professors and students have traveled and plan to continue to come from other areas of the United States into California to study and observe the arroyo toad. Moreover, like other endangered species, the arroyo toad has potential commercial value, including invaluable contributions to the genetic pool.

In response, plaintiff appears to argue that either Con-

gress or this Court is required to make a determination as to whether each individual species "substantially affects interstate commerce," rather than to accept Congress' more general finding that the preservation of species in the aggregate is crucial to the commerce of this Nation. Given that approximately 13 to 30 million different species now exist (National Wildlife Federation Brief at 4), plaintiffs' argument must be rejected as contrary to basic scientific knowledge, *see NAHB,* 130 F.3d at 1058 (Henderson, J., concurring) ("The effect of a species' continued existence on the health of other species within the ecosystem seems to be generally recognized among scientists."), as well as the law as set forth in *Lopez* and in *NAHB.*

> In evaluating whether ESA section 9(a)(1) is a regulation of ... activity that substantially affects interstate commerce, we may look not only to the effect of the extinction of the individual endangered species at issue in this case, but also to the aggregate effect of the extinction of all similarly situated endangered species. As the *Lopez* Court explained, "where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under the statute is of no consequence." If a statute regulates a class of activities within reach of the federal power, the courts have no power to excise, as trivial, individual instances of the class. Because section 9(a)(1) of the ESA regulates a class of activities—takings of endangered species—that is within Congress' Commerce Clause power under ... [the] third *Lopez* categor[y], application of section 9(a)(1) to the fly is constitutional.

NAHB, 130 F.3d at 1046 (quoting *Lopez,* 514 U.S. at 558) (other internal quotations and citations omitted).

Second, the Court must consider whether the statute in question has an express jurisdictional element that restricts its application to activities that have an explicit connection

with interstate commerce. *Morrison,* 529 U.S. at 611-12. Although the "take" provision of the ESA contains no jurisdictional element, such a provision is found in §§ 9(a)(1)(E) and 9(a)(1)(F). The statute states in relevant part:

> (1) with respect to any endangered species of fish or wildlife ... it is unlawful for any person [to -]
>
> (B) take any such species into, or export any such species from the United States; ...
>
> (E) deliver, receive, carry, transport, or ship, in interstate or foreign commerce, any such species and in the course of a commercial activity, any such species;
>
> (F) sell or offer for sale in interstate or foreign commerce any such species; ....

16 U.S.C. § 1538(a)(1). In addition to prohibiting the interstate transport of endangered species, as explained below, one of the primary reasons that Congress enacted the ESA was to ensure the continuing availability of a wide variety of species to interstate commerce. Whether a species lives entirely within a single state is irrelevant to that larger purpose. The jurisdictional grant of § 9, combined with Congress' purpose in enacting the ESA, supports a finding that the Act is explicitly connected to interstate commerce. *Shields,* at 26-27.

Third, the court must examine whether the statute or the legislative history contains express congressional findings regarding its effects upon interstate commerce. *Morrison,* 529 U.S. at 612. The legislative history of the ESA is crystal clear: Congress repeatedly emphasized that it was enacting the statute in order to protect a commercial resource. Committee Reports on the ESA recognized the potential for future commerce with respect to endangered species.

The House Report explained:

> As we homogenize the habitats in which these plants and animals evolved, and as we increase the pressure

> for products that they are in a position to supply (usually unwillingly) we threaten their—and our own—genetic heritage. The value of this genetic heritage is, quite literally, incalculable ....
>
> ....
>
> From the most narrow possible point of view, it is in the best interests of mankind to minimize the losses of genetic variations. The reason is simple: they are potential resources. They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask.
>
> ....
>
> Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed? More to the point, who is prepared to risk being [sic] those potential cures by eliminating those plants for all time? Sheer self interest impels us to be cautious.

H.R. Rep. No. 93-412, at 4-5 (1973). Similarly, the Senate Report relating to the precursor to the ESA noted:

> From a pragmatic point of view, the protection of an endangered species of wildlife with some commercial value may permit the regeneration of that species to a level where controlled exploitation of that species can be resumed. In such a case, businessmen may profit from the trading and marketing of that species for an indefinite number of years, where otherwise it would have been completely eliminated from commercial channels in a very brief span of time. Potentially more important, however, is the fact that with each species we eliminate, we reduce the [genetic] pool ... available for use by man in future years. Since each living species and subspecies has developed in a

> unique way to adapt itself to the difficulty of living in the world's environment, as a species is lost, its distinctive gene material, which may subsequently prove invaluable to mankind in improving domestic animals or increasing resistance to disease or environmental contaminant, is also irretrievably lost.

S. Rep. No. 91-526, at 3 (1969), *quoted in NAHB,* 130 F.3d at 1050-51. Because the legislative history explicitly sets forth Congress' reasoning in enacting the ESA, the third factor weighs heavily in support of upholding the Act.

Finally, the court must determine whether the relationship between the regulated activity and interstate commerce is attenuated. *Morrison,* 529 U.S. at 612. The Court finds that it is not. We do not have to "pile inference upon inference," *Lopez,* 514 U.S. at 567, to conclude that the "taking" of endangered species has a substantial effect on interstate commerce. Plaintiff argues that its potential "taking" of arroyo toads would only have a de minimis effect on interstate commerce. However, "because biodiversity has a real, substantial, and predictable effect on both the current and future interstate commerce, 'the de minimis character of individual instances arising under [the ESA] is of no consequence." *NAHB,* 130 F.3d at 1053 n. 14 (quoting *Lopez,* 514 U.S. at 558). Moreover, "the effect on commerce must be viewed not from the taking of one [animal], but from the potential commercial differential between an extinct and a recovered species." *Gibbs,* 214 F.3d at 497.

Plaintiff raises two other arguments in support of its position. First, it contends that NAHB is no longer controlling after the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* 531 U.S. 159 (2001) [hereinafter *SWANCC*]. In *SWANCC,* the Corps had interpreted § 404(a) of the Clean Water Act to confer federal authority over an abandoned sand and gravel pit. The Supreme Court, however, held that the Corps had exceeded its authority under the Clean Water Act. *Id* . at 162.

But the Court in *SWANCC* resolved the issue on statutory grounds, thus avoiding "the significant constitutional and federalism questions raised ...." *Id.* at 174. And dicta regarding the constitutionality of the statute only reaffirmed that a court must focus on the "precise object or activity that, in the aggregate, substantially affects interstate commerce." *Id.* at 173. *SWANCC* therefore does nothing to bolster plaintiff's argument.

Finally, plaintiff contends that the ESA as applied in this case is unconstitutional because Congress is exerting authority in the area of land use, where states traditionally have had power. "The Constitution requires a distinction between what is truly national and what is truly local." *Morrison,* 514 U.S. at 617-18. "It is well established, however, that Congress can regulate even private land use for environmental and wildlife conservation." *Gibbs,* 214 F.3d at 500. Therefore, the regulation of endangered species is easily distinguishable from the situations in *Lopez* or *Morrison,* where the Supreme Court found that Congress assumed authority in areas of traditional state concern: general police power, family law, and crime. As recognized by the Fourth Circuit, "the conservation of scarce natural resources is an appropriate and well-recognized area of federal regulation," *Gibbs,* 214 F.3d at 500, and the holdings in *Lopez* and *Morrison* do not suggest otherwise.

The observation of Judge Paul Friedman of this Court remains particularly apt, for it underscores the illogic of plaintiff's position in this case.

> According to plaintiffs, if a species is abundant and scattered plentifully across state lines, Congress is fully empowered under the Commerce clause to protect it. But when the same species becomes more scarce and its population reduced to a single state, Congress's hands are suddenly tied. This Court declines to read *Lopez* as hamstringing Congress in such an irrational fashion in a regulatory area of such im-

portant economic, scientific and environmental dimensions.

Building Industry Association of Superior California v. Babbitt, 979 F. Supp. 893, 908 (D.D.C. 1997). This Court finds this analysis to be compelling, and is unwilling to conclude, as argued by plaintiff, that this Circuit's opinion in *NAHB* has been eviscerated by the Supreme Court's decision in *Morrison.*

CONCLUSION

For the reasons stated above, plaintiff's motion for summary judgment is denied, and defendant's motion for summary judgment is granted. A separate order accompanies this opinion.

/s
ELLEN SEGAL HUVELLE
United States District Judge

Dated: Aug. 20, 2001.

Supreme Court, U.S.
FILED
JAN 28 2004
OFFICE OF THE CLERK

(6)

No. 03-761

In the Supreme Court of the United States

RANCHO VIEJO, LLC, PETITIONER

v.

GALE A. NORTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether restrictions on commercial development activities that would result in the taking of endangered arroyo toads, imposed pursuant to Section 9(a)(1) of the Endangered Species Act of 1973, 16 U.S.C. 1538(a)(1), and implementing regulations, are a permissible exercise of Congress's authority under the Commerce Clause.

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In the Supreme Court of the United States

No. 03-761

RANCHO VIEJO, LLC, PETITIONER

v.

GALE A. NORTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 323 F.3d 1062. The opinion of the district court (Pet. Supp. App. 1a-19a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 2003. A petition for rehearing was denied on July 22, 2003 (Pet. App. 32a-37a). On October 15, 2003, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 19, 2003, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*, mandates protection and conservation measures for species of fish or wildlife determined to be endangered or threatened. Administration of the ESA is divided between the Fish and Wildlife Service (FWS) in the Department of the Interior, and the National Marine Fisheries Service (NMFS) in the Department of Commerce. See 16 U.S.C. 1532(15); 50 C.F.R. 402.01(b).

The ESA authorizes the Secretary of the Interior or of Commerce to list domestic or foreign species as endangered or threatened. 16 U.S.C. 1533(a).[1] Section 9(a)(1) of the Act, 16 U.S.C. 1538(a)(1), prohibits takings of endangered species by any person who does not have a permit or other authorization. Under the ESA, the term "take" is defined to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. 1532(19). Federal regulations further define the term "harm" to encompass conduct that "actually kills or injures wildlife," which may include "significant habitat modification or degradation" that "impair[s] essential behavioral patterns." 50 C.F.R. 17.3; see *Babbitt* v. *Sweet Home Chapter of Cmtys*, 515 U.S. 687 (1995) (upholding regulatory definition of "harm" for purposes of Section 9 "take" prohibition).

Pursuant to Section 10 of the ESA, the Secretary of the Interior or of Commerce may issue a permit for the

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[1] An endangered species is one that is in danger of extinction throughout all or a significant portion of its range. 16 U.S.C. 1532(6). A threatened species is one that is likely to become endangered within the foreseeable future throughout all or a significant portion of its range. 16 U.S.C. 1532(20).

"incidental take" of listed species under certain circumstances. 16 U.S.C. 1539(a)(3)(B)(i)-(v). Any taking of a listed species consistent with such an "incidental take" permit does not violate Section 9. 16 U.S.C. 1539(a)(1)(B).

Section 7(a)(2) of the ESA, 16 U.S.C. 1536(a)(2), requires each federal agency to ensure, in consultation with the FWS or NMFS, that any action it authorizes, funds, or carries out is not likely to "jeopardize the continued existence of any endangered species." When a federal agency engages in "formal" consultation with the relevant consulting agency (FWS or NMFS), the consulting agency produces a biological opinion that assesses whether the proposed action is likely to jeopardize the listed species. 16 U.S.C. 1536(b)(4). If the FWS or NMFS concludes that jeopardy is likely, the biological opinion may identify reasonable and prudent alternatives to the action. 16 U.S.C. 1536(b)(3)(A). If the consulting agency determines that the proposed action is not likely to jeopardize the listed species, or offers reasonable and prudent alternatives that the consulting agency believes would not result in jeopardy, the biological opinion may include an incidental take statement that identifies terms and conditions to minimize the taking of listed species. 16 U.S.C. 1536(b)(4). Any taking that is in compliance with the terms and conditions in the incidental take statement is not prohibited by Section 9. 16 U.S.C. 1536(*o*)(2).

2. On December 16, 1994, the arroyo toad (*Bufo californicus*) was listed as an endangered species. 59 Fed. Reg. 64,859; Pet. App. 39a. The arroyo toad is approximately two to three inches in length. Arroyo toads breed on shallow pools and open sand and gravel channels along medium to large streams, but they spend most of their adult lives in upland habitats,

burrowing underground during inactive periods. 66 Fed Reg. 9414, 9415 (2001). Adult toads may range as far as 1.2 miles from the streams where they breed. *Ibid.*; see Pet. App. 40a.

The arroyo toad is found in coastal and desert drainages from Monterey County, California, to northwestern Mexico. 66 Fed. Reg. at 9414; Pet. App. 40a. Many arroyo toad populations have been extirpated or reduced in size, due principally to habitat loss, including from activities such as mining, grazing, recreation, urbanization, road construction, and dam construction. 66 Fed. Reg. at 9414; 59 Fed. Reg. at 64,862.

3. Petitioner is a real estate development company located in California. Petitioner proposed to build a 280-home development on a 202-acre site located in northern San Diego County. The property is bordered on the south by Keys Creek, a tributary of the San Luis Rey River. The precise terms of petitioner's development plans have varied over the years, but at the time this case was brought, petitioner proposed to build homes within an upland area of approximately 52 acres. An additional 77 acres of upland, as well as portions of Keys Creek, were to be used as a borrow area to extract fill for the construction site. The excavation of those 77 acres was expected to involve removal of approximately 750,000 cubic yards of fill material. Pet. App. 4a, 38a-39a.

On May 21, 1999, petitioner filed an application with the United States Army Corps of Engineers (Corps) to obtain a permit under Section 404 of the Clean Water Act, 33 U.S.C. 1344, for the discharge of dredged or fill material into waters of the United States. The Corps determined that the project "may affect" the arroyo toad, and it requested formal consultation with the FWS. Pet. App. 39a; see p. 3, *supra*.

In May 2000, petitioner began ground-disturbing activities in the 77-acre borrow area. *Inter alia*, petitioner excavated a trench and erected a fence along the trench paralleling the bank of Keys Creek, approximately 50-100 feet uphill from the riparian vegetation along the creek. The FWS and petitioner's own consultant subsequently confirmed the presence of arroyo toads on the upland side of the exclusionary fence. Previous surveys carried out by petitioner's consultants had confirmed the presence of arroyo toads in Keys Creek during the breeding season, and the FWS determined that the fence could impede the toads' movement between the upland area and their breeding habitat. On May 22, 2000, the FWS informed petitioner that the construction and continued existence of the exclusionary fence violated ESA Section 9's take prohibition. Petitioner nevertheless refused to remove the fence. Pet. App. 5a, 40a-41a.

In August 2000, the FWS issued a biological opinion, which determined that the excavation of the 77-acre upland borrow area was likely to jeopardize the continued existence of the arroyo toad. Pursuant to Section 7(b)(3)(A) of the ESA, 16 U.S.C. 1536(b)(3)(A), the FWS developed a reasonable and prudent alternative that would allow petitioner to implement its proposed plan to build 280 homes on the 52-acre parcel by obtaining fill dirt from off-site sources. The biological opinion included an incidental take statement that allows petitioner to "take" arroyo toads incidental to its housing development project if it complies with the terms and conditions set forth in the reasonable and prudent alternative described in the opinion. Pet. App. 5a, 42a.

3. On November 20, 2000, petitioner filed suit in federal district court, alleging that the application of

ESA Section 9 to petitioner's construction activities exceeded Congress's power under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3. Pet. Supp. App. 2a. On August 20, 2001, the district court granted the government's motion for summary judgment. *Id.* at 1a-19a.

The district court found this case to be controlled by the court of appeals' decision in *National Ass'n of Homebuilders* v. *Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (*NAHB*), cert. denied, 524 U.S. 937 (1998), which upheld the application of ESA Section 9 to a hospital construction project in California. Pet. Supp. App. 10a-11a; see Pet. App. 6a. The district court also independently applied the four-factor analytical framework, established by this Court's decisions in *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000), for determining whether a particular regulatory scheme is a permissible exercise of congressional authority under the Commerce Clause. The district court concluded that the ESA's prohibition on takings of endangered species is constitutional under that framework. Pet. Supp. App. 11a-17a. The court rejected petitioner's contention that *NAHB* has been undermined by this Court's subsequent decision in *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), and it held that the take provision does not impermissibly extend federal authority to the area of land use. Pet. Supp. App. 17a-19a.

5. The court of appeals affirmed. Pet. App. 1a-31a.

a. The court of appeals explained that in this case, as in *NAHB*, the primary conduct that is regulated by ESA Section 9 (here, "the construction of a 202-acre commercial housing development") is "plainly an economic enterprise." Pet. App. 9a. The court acknowledged that "Section 9 of the ESA has no express juris-

dictional hook that limits its application, for example, to takes 'in or affecting commerce.'" *Id.* at 10a. The court observed, however, that "*Lopez* did not indicate that such a hook is required, * * * and its absence did not dissuade the * * * *NAHB* court from finding application of the ESA constitutional." *Ibid.* Rather, the court explained, the absence of an express jurisdictional element simply required the court to determine independently whether the regulated activity bore a constitutionally sufficient nexus to interstate commerce. *Ibid.* The court of appeals concluded that application of ESA Section 9 to petitioner's conduct is a permissible exercise of Commerce Clause authority because petitioner's commercial housing development —like the hospital construction project involved in *NAHB*—"is presumably being constructed using materials and people from outside the state and * * * will attract construction workers and purchasers from both inside and outside [California]." *Id.* at 12a (internal quotation marks omitted).

b. The court of appeals rejected petitioner's contention that the *NAHB* court's analysis had been superseded by this Court's decisions in *Morrison* and *SWANCC*. Pet. App. 13a-18a. The court noted that *SWANCC* involved the interpretation of the Clean Water Act, and that the Court in that case had declined to resolve the plaintiff's constitutional challenge. See *id.* at 14a. The court found *Morrison* to be distinguishable because that case "involved the regulation of purely noneconomic activity." *Id.* at 17a. The court observed that "[h]ere, by contrast, both the actor, a real estate company, and its conduct, the construction of a housing development, have a plainly commercial character." *Ibid.* (internal quotation marks omitted).

c. The court of appeals rejected petitioner's contention that, even if its own conduct is economic in character, application of ESA Section 9 to its construction activities is impermissible because Section 9 has a noneconomic *purpose*, namely the protection of biodiversity. Pet. App. 18a-24a. The court observed that "the ESA, like many statutes, has multiple purposes," *id.* at 18a, and that any effort to identify Section 9's "true" or "primary" purpose would be "fraught with both difficulty and danger," *id.* at 19a. The court of appeals also noted that this Court "has long held that Congress may act under the Commerce Clause to achieve noneconomic ends through the regulation of commercial activity." *Id.* at 20a.

d. The court of appeals held that petitioner could not avoid the application of ESA Section 9 to its own commercial activities based on the possibility of hypothetical applications of the statute to noneconomic conduct. Pet. App. 24a-27a. The court of appeals explained that, because "the particular application [of Section 9] before us involves the regulation of [petitioner's] commercial real estate development, which falls well within the powers granted Congress under the Commerce Clause," the court "need not decide" whether Section 9 would be constitutional as applied to a taking caused by a hiker's recreational activities. *Id.* at 25a. The court further observed that "the constitutional circumstances we rely on here—takings by commercial developers—are neither an unintended nor an insignificant portion of the activities regulated by the ESA." *Id.* at 26a. Rather, in enacting the ESA, "Congress expressly found that economic growth and development untempered by adequate concern and conservation was the cause for various species of fish, wildlife, and plants in

the United States having been rendered extinct." *Ibid.* (brackets and internal quotation marks omitted).

e. The court of appeals rejected petitioner's contention that "the ESA represents an unlawful assertion of congressional power over local land use decisions." Pet. App. 27a. The court explained that, "[f]ar from encroaching upon territory that has traditionally been the domain of state and local government, the ESA represents a national response to a specific problem of 'truly national' concern." *Ibid.* The court observed that "the preservation of endangered species is historically a federal function," and that "invalidating this application of the ESA would call into question the historic power of the federal government to preserve scarce resources in one locality for the future benefit of all Americans." *Id.* at 29a (internal quotation marks omitted).

f. Judge Ginsburg filed a separate concurring opinion. Pet. App. 30a-31a. Judge Ginsburg expressed the view that, "with respect to a species that is not an article in interstate commerce and does not affect interstate commerce, a take can be regulated if—but only if —the take itself substantially affects interstate commerce." *Id.* at 30a. He concluded that the application of ESA Section 9 to petitioner's conduct is permissible because "[t]he large-scale residential development that is the take in this case clearly does affect interstate commerce." *Id.* at 30a-31a. Judge Ginsburg stated, however, that "the lone hiker in the woods, or the homeowner who moves dirt in order to landscape his property, though he takes the toad, does not affect interstate commerce." *Id.* at 31a.

g. The court of appeals denied petitioner's petition for rehearing and rehearing en banc, with Judge

Sentelle and Judge Roberts dissenting. Pet. App. 32a-37a.[2]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 6-14) that the court of appeals' decision conflicts with this Court's decisions in *Lopez*, *Morrison*, and *Jones* v. *United States*, 529 U.S. 848 (2000). That claim is incorrect.

a. The thrust of the court of appeals' analysis is that, whether or not Congress may constitutionally ban those takings of endangered species that result from noncommercial activity, ESA Section 9 is constitutional as applied to petitioner's own conduct. The court explained that in this case, "both the 'actor,' a real estate company, and its 'conduct,' the construction of a housing development, have a plainly commercial character." Pet. App. 17a. Petitioner argues (*e.g.*, Pet. 8-9) that, under *Lopez* and *Morrison*, the court of appeals was required to focus on the generic class of activity prohibited by the provision in question (takings of arroyo toads) and to ignore the economic character of petitioner's own activities.

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[2] By letter dated December 30, 2003, petitioner informed the Court that the Corps has issued petitioner a provisional permit under Section 404 of the Clean Water Act. We agree with petitioner that the Corps' issuance of that permit does not render this case moot. As petitioner's December 30 letter explains, the Section 404 permit is expressly made contingent on petitioner's compliance with the terms and conditions identified in the incidental take statement of the FWS's biological opinion. See Pet. Notice of Intervening Matter at 2, Exh. A at 6.

Contrary to petitioner's contention, *Lopez* and *Morrison* simply do not address the question whether Commerce Clause legislation may be sustained "as applied" to commercial activities even where the statute in question also covers noneconomic conduct. Rather, this Court decided both *Lopez* and *Morrison* on the understanding that, in those cases, "neither the actors nor their conduct ha[d] a commercial character." *Morrison*, 529 U.S. at 611 (quoting *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring)). In the present case, by contrast, the "regulated activity is [petitioner's] planned commercial development, not the arroyo toad that it threatens." Pet. App. 16a. Because petitioner is a business entity, and the regulated conduct at issue here is economic in character, this case is very different from *Lopez* and *Morrison*.[3]

b. "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973).

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[3] As petitioner observes (Pet. 9), the court of appeals in *Lopez* stated that the defendant had brought his gun to school for the purpose of selling it. See *United States* v. *Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993). But since this Court did not allude to that fact or discuss its significance, its decision cannot properly be understood to hold that "as applied" analysis is inapplicable to Commerce Clause legislation. In any event, there is no reason to suppose that violations of the Gun-Free School Zones Act (the law at issue in *Lopez*) *frequently* involved economically motivated conduct. By contrast, takings of endangered species in violation of ESA Section 9 characteristically result from economic activity. See pp. 12-13, *infra*.

Petitioner identifies no decision of this Court that has held, and no sound reason to conclude, that this principle is inapplicable to judicial review of Commerce Clause legislation. Cf. *Salinas* v. *United States*, 522 U.S. 52, 60-61 (1997) (holding that 18 U.S.C. 666(a)(1)(B) is constitutional as applied to a bribery offense that threatens the integrity of the relevant federal program, and affirming the defendant's conviction on that basis, without addressing the constitutionality of other potential applications of the statute).[4]

As the court of appeals observed, moreover, "takings by commercial developers * * * are neither an unintended nor an insignificant portion of the activities regulated by the ESA." Pet. App. 26a. The ESA contains an express congressional finding that "various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. 1531(a)(1). And, as an empirical matter, it appears to be undisputed that "the majority of takes would result from

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[4] As the court of appeals recognized (Pet. App. 25a), petitioner's legal theory reflects an artful attempt to obtain the most advantageous features of both "as applied" and "facial" review. On the one hand, petitioner "would like [the Court] to consider its challenge to the ESA only as applied to the arroyo toad, which it says has no known commercial value." *Ibid.* (internal quotation marks omitted); see Pet. 4 (noting that the FWS has not made "express findings of any connection between the arroyo toad and interstate commerce"); Pet. 13 ("[T]he listing of the arroyo toad aims at conduct that by its terms has nothing to do with interstate commerce."). At the same time, petitioner asks the Court to disregard its own status as a business entity and the commercial character of the specific development activities that are alleged to violate the take prohibition in this case.

economic activity." *GDF Realty Invs., Ltd.* v. *Norton*, 326 F.3d 622, 639 (5th Cir. 2003); see Pet. App. 27a (endorsing the government's representation that "the activities that cause the loss of endangered species and that are regulated by the take prohibition are themselves generally commercial and economic activities").

In that respect, this case is quite different from *Lopez* and *Morrison*, in which there was no reason to suppose that violations of the challenged statutes would typically be committed for economic reasons or by commercial actors. See note 3, *supra*; cf. *United States* v. *Raines*, 362 U.S. 17, 23 (1960) (suggesting that facial invalidation may be appropriate where a statute is "unconstitutional in the vast majority of its intended applications, and it can fairly be said that it was not intended to stand as valid, on the basis of fortuitous circumstances, only in a fraction of the cases it was originally designed to cover"). Indeed, petitioner identifies *no* litigated case in which ESA Section 9 has *ever* been applied to conduct undertaken for wholly noneconomic purposes. The theoretical possibility that the take prohibition might someday be applied "to a hiker's casual walk in the woods," Pet. App. 24a (internal quotation marks omitted), provides no basis for declaring its application to be unconstitutional here.

c. Petitioner contends (Pet. 8-9) that the court of appeals' decision conflicts with *Morrison* by suggesting that Commerce Clause legislation may be sustained based on the effects on interstate commerce of regulated noneconomic activity. That claim is baseless. The court of appeals correctly observed that the Court in *Morrison* had declined to adopt a categorical rule prohibiting regulation under the Commerce Clause of noneconomic activity; indeed, petitioner conceded as much

in its appellate brief. See Pet. App. 15a-16a; *Morrison*, 529 U.S. at 613 ("[W]e need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases."). That aspect of the court of appeals' analysis was irrelevant, however, to its ultimate disposition of the case. Because the court of appeals found the economic character of petitioner's own conduct to be a sufficient basis for upholding ESA Section 9's application to this case, it did not purport to resolve the question whether, or under what circumstances, noneconomic conduct may be an appropriate subject of Commerce Clause regulation. See Pet. App. 16a.

There is also no merit to petitioner's contention (Pet. 10) that the absence of an express jurisdictional element renders ESA Section 9 unconstitutional. Although this Court in both *Lopez* (see 514 U.S. at 561-562) and *Morrison* (see 529 U.S. at 611-612) found the absence of an express jurisdictional element to be relevant to the constitutional analysis, neither decision suggests that such an element is a prerequisite to valid Commerce Clause legislation. As the court of appeals correctly observed, "all of the circuits that have addressed the question since *Lopez* (as well as those that have considered the matter since *Morrison*) have concluded that the absence of an express jurisdictional element is not fatal to a statute's constitutionality under the Commerce Clause." Pet. App. 10a.[5]

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[5] See, *e.g.*, *Groome Resources Ltd., L.L.C.* v. *Parish of Jefferson*, 234 F.3d 192, 211 (5th Cir. 2000) (upholding provision of Fair Housing Amendments Act despite lack of express jurisdictional element); *Gibbs* v. *Babbitt*, 214 F.3d 483 (4th Cir. 2000) (upholding ESA restrictions on taking of red wolves despite lack of jurisdictional element), cert. denied, 531 U.S. 1145 (2001); *United States* v. *Moghadam*, 175 F.3d 1269, 1276-1277 (11th Cir. 1999) (noting that a

d. Petitioner's reliance (Pet. 11) on *Jones* v. *United States*, 529 U.S. 848 (2000), is similarly misplaced. The criminal conduct at issue in *Jones*—arson of a private residence—was committed by a private person for noneconomic reasons. By contrast, the violation of ESA Section 9 in this case was committed by a commercial development firm in the course of large-scale economic activity. Nothing in *Jones* suggests that Congress lacks power to regulate commercial activities of the sort in which petitioner engaged.

2. Contrary to petitioner's contention (Pet. 14-24), the court of appeals' decision in this case does not conflict with any decision of another circuit.

a. The courts of appeals have uniformly sustained the constitutionality of ESA Section 9's prohibition on takings of listed species. See *GDF Realty*, *supra* (upholding restrictions on takings of cave invertebrates); *Gibbs* v. *Babbitt*, 214 F.3d 483 (4th Cir. 2000) (upholding restrictions on takings of red wolves), cert. denied, 531 U.S. 1145 (2001); *NAHB*, *supra* (upholding application of ESA Section 9 to the Delhi Sands Flower Loving Fly).[6] Indeed, to our knowledge no court—either

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jurisdictional element "is helpful" but that its absence "does not necessarily mean the Commerce Clause cannot serve as authority"), cert. denied, 529 U.S. 1036 (2000); *United States* v. *Olin Corp.*, 107 F.3d 1506, 1510 (11th Cir. 1997) (Comprehensive Environmental Recovery, Compensation, and Liability Act valid as applied despite lack of jurisdictional element).

[6] See also *Shields* v. *Babbitt*, 229 F. Supp. 2d 638 (W.D. Tex. 2000) (upholding restrictions on takings of certain aquatic species), vacated on other grounds, 289 F.3d 832 (5th Cir.), cert. denied, 537 U.S. 1071 (2002); *United States* v. *Bramble*, 103 F.3d 1475 (9th Cir. 1997) (upholding the constitutionality of the Bald Eagle Protection Act); *Building Indus. Ass'n of Superior Cal.* v. *Babbitt*, 979 F. Supp. 893 (D.D.C. 1997) (upholding application of ESA Section 9 to fairy shrimp regulation), appeal dismissed, 161 F.3d 740 (D.C. Cir.

before or after this Court's decision in *Lopez*—has invalidated any federal wildlife legislation as exceeding the reach of Congress's power under the Commerce Clause. Affirmation of federal authority to act in this sphere is particularly appropriate since systemic obstacles exist to the adoption and enforcement of effective state wildlife-protection measures. See Pet. App. 28a-29a; *Gibbs*, 214 F.3d at 501 (Congress may act to "arrest the 'race to the bottom' in order to prevent interstate competition whose overall effect would damage the quality of the national environment").[7]

b. Petitioner does not contend that any other court of appeals has held ESA Section 9 to be beyond the scope of Congress's authority. In asserting that a circuit conflict exists, petitioner principally argues (see Pet. 14-17, 22-24) that the court of appeals' *reasoning* in this case is inconsistent with the Fifth Circuit's analysis in *GDF Realty*. The court in *GDF Realty* found that the economic character of the plaintiff's own activities (commercial development of real property), standing alone, was not a sufficient basis for sustaining the application of ESA Section 9 to that conduct. See 326 F.3d at 626, 634-635. The court went on to hold, however, that takings of *all* endangered species, considered in

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1998); *Palila* v. *Hawaii Dep't of Land & Natural Res.*, 471 F. Supp. 985 (D. Haw. 1979) (upholding the application of ESA Section 9 to Hawaiian bird species), aff'd, 639 F.2d 495 (9th Cir. 1981).

[7] In *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995), decided shortly after *Lopez*, this Court held that the Secretary of the Interior had reasonably construed the term "harm," as used in the ESA's definition of "take," to include habitat modification that would kill or injure members of a listed species. No member of the Court suggested that the ESA, so construed, might exceed Congress's power under the Commerce Clause.

the aggregate, would have a substantial effect on interstate commerce; and on that basis it sustained ESA Section 9 as a permissible exercise of Commerce Clause authority. See *id.* at 638-639.

The fact that the courts of appeals have employed somewhat different rationales in upholding ESA Section 9 against constitutional challenge does not create a circuit conflict. This Court "reviews judgments, not statements in opinions." *E.g.*, *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam); *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956); see *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *Williams* v. *Norris*, 25 U.S. (12 Wheat.) 117, 120 (1827). Absent some disagreement among the circuits regarding the ultimate question whether ESA Section 9 is constitutional, this Court's review is not warranted.

Moreover, petitioner overstates even the divergence between the approaches of the Fifth and D.C. Circuits. The D.C. Circuit in *NAHB* had previously endorsed the biodiversity rationale on which the *GDF Realty* court later relied. That same rationale furnishes an independent basis for sustaining the application of the ESA in this case, and the court of appeals in fact specifically disclaimed any intent to repudiate that aspect of *NAHB*'s analysis. See Pet. App. 8a-9a & n.2. Rather, in light of the commercial character of petitioner's own activities, the court of appeals "simply ha[d] no need to consider * * * other rationales to dispose of the case before [it]." *Id.* at 9a. And while the Fifth Circuit in *GDF Realty* declined to resolve the constitutional question solely on the ground that the regulated entity's own conduct was commercial in character, the court found it "obvious that the majority of takes would result from economic activity," and the court appeared to attach some (though not dispositive) significance to

the fact that the specific takes at issue in the case "would occur as a result of plaintiffs' planned commercial development." 326 F.3d at 639.[8]

c. Petitioner contends (Pet. 20-22) that two other subsidiary features of the court of appeals' analysis conflict with decisions of other circuits. Those claims lack merit.

Petitioner argues (Pet. 20-21) that the D.C. Circuit's decision, by leaving open the possibility that Commerce Clause legislation could be sustained based on the aggregate effects of noneconomic conduct, conflicts with decisions of other courts of appeals. In fact, however, the court of appeals simply (and accurately) noted

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[8] Petitioner's reliance (Pet. 19) on *United States* v. *Stewart*, 348 F.3d 1132 (9th Cir. 2003), is misplaced. In *Stewart*, a panel of the Ninth Circuit held that 18 U.S.C. 922(*o*), which generally prohibits possession of machineguns, is unconstitutional as applied to "homemade" machineguns. 348 F.3d at 1134-1142. The panel found that "[p]ossession of a machinegun is not, without more, economic in nature," *id.* at 1137, and it observed that Section 922(*o*) "contains no jurisdictional element," *id.* at 1138. The government's petition for rehearing en banc in *Stewart* is currently pending before the court of appeals. But, in any event, the panel in *Stewart* held Section 922(*o*) unconstitutional *only* as applied to simple possession of *homemade* machineguns. The panel did not suggest that the statute would be invalid as applied to acts of machinegun possession with such connections to interstate commerce as, *e.g.*, possession of a machinegun that had traveled in interstate commerce, or possession of a machinegun with the intent to sell it. Thus, with respect to the question presented in this case—*i.e.*, whether Commerce Clause legislation may be upheld as applied to a particular set of facts, based on the economic character of the specific conduct that is alleged to violate the statute—the decision in *Stewart* provides no support for petitioner's position. Indeed, petitioner's theory logically suggests that, because Section 922(*o*) is not limited to acts of machinegun possession having a specified connection to interstate commerce, that statute is invalid in *all* its applications.

that this Court in *Morrison* had declined to announce a categorical rule against aggregation in this context. See Pet. App. 15a-16a; pp. 13-14, *supra*. The court of appeals found it unnecessary to decide whether such aggregation would ever be appropriate. See Pet. App. 16a. The court's express *reservation* of that question cannot plausibly be thought to conflict with other court of appeals decisions addressing the issue.

There is likewise no merit to petitioner's contention (Pet. 21-22) that a circuit split exists regarding the significance, for Commerce Clause analysis, of an express jurisdictional element. As the D.C. Circuit recognized in this case, every post-*Lopez* appellate decision addressing the question "ha[s] concluded that the absence of an express jurisdictional element is not fatal to a statute's constitutionality under the Commerce Clause." Pet. App. 10a; see p. 14 & n.5, *supra*. Petitioner's reliance (Pet. 22) on *United States* v. *McCoy*, 323 F.3d 1114 (9th Cir. 2003), is misplaced. The Ninth Circuit in *McCoy* simply held that the presence of a jurisdictional element does not *ensure* that a particular statute is a valid exercise of congressional power under the Commerce Clause. See *id.* at 1124-1126. The court in *McCoy* did not address the question whether a jurisdictional element *must* be included to sustain a statute's constitutionality.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2004

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* The Solicitor General is recused in this case.

Supreme Court, U.S.
FILED
FEB 9 - 2004
OFFICE OF THE CLERK

(8)

No. 03-761

IN THE

Supreme Court of the United States

RANCHO VIEJO, LLC,

Petitioner,

v.

GALE A. NORTON, Secretary of the Interior, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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INTRODUCTION

The Department of Justice argues that an otherwise unconstitutional regulatory scheme can be sustained whenever it is applied to a business entity. If nothing else, its contention has the virtue of consistency with the position previously staked out by the prior administration in cases such as *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), and *Gibbs v. Babbit*, 214 F.3d 483 (4th Cir. 2000). But this Court *rejected* the identical argument in *SWANCC* that the Department again advances here. Thus, far from undermining the importance of Petitioner's request for a writ of certiorari, the Government's response actually demonstrates just why a writ of certiorari should issue in this case to counteract the persistent refusal of both the lower courts and the Department of Justice itself to follow this Court's opinion in *SWANCC*.

Moreover, the Government's suggestion that the Endangered Species Act, 16 U.S.C. §§ 1531-44, is simply not enforced against non-commercial entities is not only legally irrelevant, but erroneous as a factual matter. Countless private individuals have been caught up in ESA's regulatory snare, and the fact that most do not have the resources to fight the Government's unconstitutional regulatory regime to a published court decision does not make the Government's overreach any the less problematic. The simple fact remains that ESA "by its terms" aims at conduct that is neither commerce nor interstate in nature. The particular conduct at issue here—the erection of a fence and the proposed grading of some land—is itself neither commerce nor interstate, even though engaged in by a business entity. Were the court of appeals' decision correct, this Court's long-standing concern with protecting the line between that which is national and that which is truly local would be rendered meaningless. In any event, the decision below is "conspicuously in conflict" with a decision by the Fifth Circuit on this important post-*Lopez* issue, a conflict that requires this Court's review.

I. The Commerce Clause Does Not Permit Regulation of Local, Intrastate Activity that Has No Substantial Effect on Commerce Merely Because the Conduct May Be Undertaken By Economic Actors.

The Government's principal contention is that certiorari is not warranted in this case because the Court of Appeals decision below is fully consistent with this Court's recent Commerce Clause jurisprudence, which, according to the Government, recognizes that Congress' power to regulate commerce among the states is broad enough to reach *any* activity undertaken by commercial entities, no matter how local or insignificant to interstate commerce, and no matter whether the statute actually by its terms even addresses commerce or has any jurisdictional element that would limit its reach to conduct affecting interstate commerce.

The Government's contention is strikingly similar to the argument it made in *SWANCC*, where it was rejected (or at least called into serious doubt) by a majority of this Court.

At page 8 of its opposition brief, for example, the Government embraced the Court of Appeals' holding "that petitioner could not avoid the application of ESA Section 9 to its own commercial activities based on the possibility of hypothetical applications of the statute to non-economic conduct." In its merits brief in *SWANCC*, the Government made the identical point, even using the same "hypothetical applications" phrasing:

> The proposed activity for which petitioner sought a permit is commercial in character, and it would have a substantial impact on the bird species that use the area for habitat. The Court's inquiry should focus on the facts of this case, rather than on hypothetical applications of the Corps' jurisdictional rule to non-economic conduct.

SWANCC, Gov't Merits Br., at 13.

Similarly, the Government here seeks to distinguish *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), by noting that the "regulated activity is [petitioner's] planned commercial development, not the arroyo toad that it threatens." Gov't Opp. at 11. In *SWANCC*, the Government repeatedly pitched the same distinction: "The activities for which petitioner sought a Section 404 permit are of a commercial character." *SWANCC*, Gov't Merits Br., at 37; *see also id.*, at 43 ("The proposed activity for which petitioner sought a federal permit—the filling of ponds in order to construct a municipal landfill—is plainly of a commercial nature"); *id.* at 44 ("Notwithstanding the commercial character of petitioner's own proposed activities, and the undisputed impact of those activities on migratory birds, petitioner's argument focuses largely on hypothetical situations not before the Court").

The Government's arguments in *SWANCC* were thought to raise such "significant constitutional questions" that this Court was unwilling to afford deference to the Corps of Engineers' interpretation of the Clean Water Act as authorizing the regulation of wholly intrastate, non-navigable waters merely because they might be visited by migratory birds, even where the particular conduct at issue was a clearly commercial waste disposal operation.[1] Indeed, this Court all but rejected the Government's claim that commercial conduct could be regulated even though the express terms of the statute were not addressed to commercial conduct:

> [W]e would have to evaluate the precise object or activity that, in the aggregate, substantially affects inter-

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[1] It should be noted that Petitioner has repeatedly disputed the Government's claim that the conduct at issue here was commercial. As Judge Sentelle noted in his dissent from the denial of rehearing below, "[g]round preparation and erection of a fence are not commerce, and certainly not interstate. Even the construction of houses hardly constitutes interstate commerce." Pet. App. 36a (Sentelle, J., dissenting from denial of petition for rehearing en banc).

> state commerce. This is not clear, for although the Corps has claimed jurisdiction over petitioner's land because it contains water areas used as habitat by migratory birds, respondents now, *post litem motam*, focus upon the fact that the regulated activity is petitioner's municipal landfill, which is "plainly of a commercial nature." But this is a far cry, indeed, from the "navigable waters" and "waters of the United States" to which the statute *by its terms* extends.

SWANCC, 531 U.S., at 173 (second emphasis added); *see also* Jeffrey H. Wood, *Recalibrating the Federal Government's Authority to Regulate Intrastate Endangered Species After SWANCC*, 19 J. Land Use & Envtl. L. 91, 107 (2003).

In other words, a majority of this Court has already expressed serious constitutional doubt about, if not effectively rejected, the Government's contention that an environmental regulation can be applied to commercial actors even where the statute "by its terms" has no connection with interstate commerce.[2]

At best (from the Government's perspective), whether the Commerce Clause permits such a broad reach as was urged by the Government and sanctioned by the court below is an open question after *SWANCC*. At worst, the Government's position, like that of the Court of Appeals below, ignores the strong admonition of this Court in *SWANCC*. In either case, certiorari is warranted to clarify just what is permitted under the understanding of the Commerce Clause reaffirmed in *SWANCC*.

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[2] The Government's reliance on *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973), misses Petitioner's point, and that of this Court in *Lopez*, *Morrison*, and *SWANCC*. Petitioner is not seeking to raise the unconstitutionality claims of third parties; it is rather seeking to challenge the constitutionality of the arroyo toad listing in all its applications, as a regulation that exceeds the scope of Commerce Clause authority because "by its terms" it does not even mention, much less aim at, interstate commerce or conduct that substantially effects interstate commerce.

II. The ESA Is Neither Aimed At, Nor Exclusively Used Against, Economic Actors.

The Government's second (and related) contention is that the extension of the ESA to wholly intrastate, non-commercial species such as the arroyo toad at issue here (or the cave bugs at issue in *GDF Realty, Inc. v. Norton*, 326 F.3d 622 (5th Cir. 2003)) is a permissible exercise of Congress's Commerce Clause authority because most of the conduct actually prohibited by such regulatory extensions will be undertaken by economic actors. Indeed, the Government goes so far as to imply that that the ESA has *never* been applied to non-economic conduct, stating that "petitioner identifies *no* litigated case in which ESA Section 9 has *ever* been applied to conduct undertaken for wholly non-economic purposes." Gov't Opp. at 13 (emphasis in original).

The Government's contention is legally irrelevant, and the implication it seeks to draw from its factual assertion is patently false, in any event. Moreover, the explicitly acknowledged split on this rationale between the D.C. Circuit here and the Fifth Circuit in *GDF Realty* warrants this Court's attention.

A. The Extent of Commercial Activity Covered by a Regulatory Scheme Is Irrelevant To Whether The Statute "By Its Terms" Aims At Conduct Within the Scope of the Commerce Power.

Seeking to distinguish this Court's decision in *Lopez* (which involved, as the Government candidly acknowledges, the *sale* of a gun), the Government contends that the extension of the ESA to the arroyo toad is permissible because most of the activity prohibited as a result will "characteristically result from economic activity." Gov't. Opp. 11 n.3. The Government made that point, too, in *SWANCC*. It described the case as "representative" because the "loss of migratory bird habitat has been caused overwhelmingly by commercial activities—agricultural and industrial development, urbaniza-

tion, and other commercial development," and it sought to distinguish *Lopez* by claiming that the "commercial nexus" between Lopez's gun possession and attempt sale was "legally irrelevant to Lopez's guilt." *SWANCC*, Gov't Merits Br. at 45 and n.38. Again, this Court rejected the Government's contention in *SWANCC*, stating that the courts were to focus on the "precise conduct" that the statute prohibited "by its terms." Certiorari is warranted to reject the identical contention here, as well.

B. The Government Has Enforced the ESA Against, or Required Permits of, Countless Non-Ecomonic Actors.

Moreover, even if the number of economic actors reached by a regulatory scheme was somehow relevant to the issue whether the statute "by its terms" reaches conduct that is within the Commerce Clause authority of the federal government, the Government is simply wrong to suggest that the ESA is rarely, if ever, enforced against non-economic actors. Countless private individuals have been forced to seek federal permits for non-economic activity on their own land. It would take a more thorough review of the thousands of Section 9 violation letters issued every year by the Fish & Wildlife Service than is possible here, but there are more than enough cases that actually resulted in litigation to refute the Government's point.

John Taylor v. United States, No. 99-131-L (Fed. Cl. 1999), for example, was an inverse condemnation case challenging the Fish & Wildlife Service's refusal to allow Taylor to build a house on his own property because of the presence of a bald eagle next on an adjoining parcel. *United States v. St. Onge*, 676 F. Supp. 1044 (Dist. Mon. 1988), involved a prosecution of a recreational hunter for mistakenly shooting a grizzly bear. *United States v. Billie*, 667 F. Supp. 1485 (S.D. Fl. 1987), involved the prosecution of the chairman of the Seminole Indian Tribe for "taking" a Florida panther for use by the tribe's medicine man. In *United States v. McKittrick*,

142 F.3d 1170 (9th Cir. 1998), McKittrick was prosecuted for killing a gray wolf that had strayed from its habitat in Yellowstone National Park. And *Gibbs* arose as the result of the criminal prosecution of a farmer who shot a red wolf that was on his land, threatening his livestock. The farmer, as well as county officials, challenged the constitutionality of the red wolf listing and federal government's program re-introducing red wolves in areas where they could threaten people, family pets and livestock on private land. 214 F.3d, at 489; *cf. State v. Sour Mountain Realty, Inc.*, 714 N.Y.S.2d 78 (N.Y. App. Div. 2000) (holding that private landowner's construction of a snake-proof fence to keep timber rattlesnakes from a nearby den off his property violated the state's ESA).

The Government will undoubtedly contend that some (or all) of these cases involved economic conduct, much as it contended in *SWANCC* that "a private homeowner's decision to fill waters in his backyard without the use of a commercial contractor ... may be regarded as quasi-economic in essentially the same way as the homegrown wheat production and consumption that was at issue in Wickard." *SWANCC*, Gov't Merits Br. at 46 n.37. But such a breathtakingly broad understanding of "economic" activity would clearly obliterate any distinction between national and local activity, and destroy any remaining limits on the scope of federal power.

Moreover, even if the Government declined to prosecute ESA violations against non-economic actors, the citizen suit provisions of the ESA, 16 U.S.C. § 1540(g), nevertheless subject such actors to significant civil liability. *Shields v. Babbitt*, 229 F.Supp.2d 638 (W.D.Tex., 2000), *rev'd on justiciability grounds sub nom. Shields v. Norton*, 289 F.3d 832 (5th Cir. 2002), for example, arose out of a threatened suit by the Sierra Club against a private landowner for alleged "takes" of wholly intrastate species.

Perhaps even more fundamentally, the refusal by the Fish and Wildlife Service to give permits to non-economic actors

will often not be "litigated," but can nevertheless have devastating consequences. As noted in the *amicus* brief filed by Texas on behalf of several States in support of the instant petition, the Service's refusal to permit controlled burns by California forestry officials for six years running because of the potential harm to potential arroyo toad habitat was a contributing cause of the wildfires that burned over 730,000 acres of forest, destroyed nearly 4,000 homes, and claimed at least 20 lives in southern California last October. Texas Amicus Br. at 3; Ben Goad & Jennifer Bowles, *Fire Official Faults Agency*, THE PRESS-ENTERPRISE, Dec. 16, 2003, at A01; Jia-Rui Chong, *California; Federal Agency Faulted in Fires*, LOS ANGELES TIMES, Dec. 15, 2003, at B1; Jennifer Muir, *Sometimes It Looked Like a Nuclear War*, THE ORANGE COUNTY REGISTER, Nov. 14, 2003, at A1.

The Service's refusal to grant the requested permits had no connection whatsoever with interstate commerce, and was not aimed at business entities. It was, instead, a massive intrusion on the reserved powers of the States and dispositive proof that the centralized command-and-control regulatory apparatus of the ESA, at least as applied to wholly intrastate, non-commercial species, is more than just unconstitutional—it is devastatingly bad policy as well.

C. The Split In Rationales Between the D.C. Circuit and the Fifth Circuit Is Real, and Significant.

Finally, the Government discounts—even misrepresents—the extent and significance of the split between the Fifth Circuit in *GDF Realty* and the D.C. Circuit in this case, describing the decisions as merely employing "somewhat different rationales." Opp. 17.[3] The rationales relied upon by

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[3] The Government also sets up a straw man by erroneously asserting that Rancho Viejo contended that there was a decisional circuit split, rather than the split in rationales among the circuits that Rancho Viejo actually asserted. *See* Opp. 15 ("Contrary to petitioner's contention, the court of appeals' decision in this case does not conflict with any decision of another circuit"). The Government later retracted this straw man argument.

the two circuits were not just "somewhat different," but actually and explicitly contradictory, as though the courts were reading "two different statutes." Jud Mathews, *Turning the Endangered Species Act Inside Out?*, 113 Yale L. J. 947, 947 (2004).

The Government does not even address, and therefore apparently concedes, Rancho Viejo's argument regarding the split in how the D.C. Circuit and the Fifth Circuit have addressed the biodiversity rationale. Yet the fact remains that the D.C. Circuit, per Judge Wald in *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), expressly rejected the biodiversity rationale—the only rationale accepted by the Fifth Circuit—in non-total extinction, portion-of-the-range cases such as this.

The extent of the split in rationales is perhaps most clear in how the two circuits treated the commercial nature of the regulated actor. The Government erroneously claims that the Fifth Circuit in *GDF Realty* "appeared to attach some (though not dispositive) significance to the fact that the specific takes at issue in the case would occur as a result of plaintiffs' planned commercial development.'" Opp. 17-18 (citing *GDF Realty*, 326 F.3d at 639). In truth, as Petitioner noted in its petition, the Fifth Circuit's refusal to give *any* significance to the GDF Realty's commercial development—a proposed Wal-Mart store—could not have been more clear:

> Neither the plain language of the Commerce Clause, nor judicial decisions construing it, suggest that ... Congress may regulate activity (here, Cave Species takes) solely because non-regulated conduct (here, commercial development) by the actor engaged in the regulated activity will have some connection to interstate commerce.... To accept [such an] analysis would

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Opp. 16 ("In asserting that a circuit conflict exists, petitioner principally argues that the court of appeals' *reasoning* in this case is inconsistent with the Fifth Circuit's analysis in *GDF Realty*").

> allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors.

GDF Realty, 326 F.3d, at 634-35. As Judge Sentelle pointed out, the Fifth Circuit's rejection of the Congress-can-regulate-anything-a-business-does rationale is "conspicuously in conflict" with the decision of the D.C. Circuit below. Pet. App. 35a.[4]

CONCLUSION

For the reasons stated above and previously, the petition for writ of certiorari should be granted.

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[4] The Government's reliance on *Williams v. Norris*, 25 U.S. (12 Wheat.) 117, 120 (1827), and its progeny for the unexceptional proposition that this Court "reviews judgments, not statements in opinions," is misplaced. The proposition applies in the context of a successful party who seeks to challenge the reasoning of a lower court decision in its favor. *See Sea-Land Serv. v. DOT*, 137 F.3d 640 (D.C. Cir. 1998) (citing, e.g., *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241, 242 (1939)). Moreover, Rancho Viejo has not taken some statement from the D.C. Circuit's opinion out of context, but has contended that the circuit courts' rejection of each other's reasoning undermines those courts' decisions upholding the constitutional of the ESA as applied to wholly intrastate, non-commercial species and therefore warrants this Court's review.

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DATED: February 10, 2004

Supreme Court, U.S.
FILED
MAR 25 2004
OFFICE OF THE CLERK

No. 03-761

IN THE

Supreme Court of the United States

RANCHO VIEJO, LLC,

Petitioner,

v.

GALE A. NORTON, Secretary of the Interior, *et al.*,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR REHEARING

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The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on March 1, 2004, and (2) granting the petition or, alternatively, staying a decision on the petition until disposition of the anticipated petition for a writ of certiorari in *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003), *rehearing denied*, 2004 WL 396975 (5th Cir. Feb. 27, 2004). The petition is timely filed pursuant to Rule 44.2.

Petitioner asserts as grounds for this motion the following:

1. **Six additional judges on the U.S. Court of Appeals for the Fifth Circuit have recently expressly acknowledged the circuit split that was the basis for the petition for writ of certiorari.**

On Friday, February 27, 2004—the very day that this Court considered the petition for writ of certiorari in this case—the Fifth Circuit released its decision denying a petition for rehearing and rehearing en banc in *GDF Realty* that had been pending for nearly a year. Particularly significant is the lengthy opinion by Circuit Judge Edith Jones—joined by Circuit Judges Grady Jolly, Jerry Smith, Harold DeMoss, Edith Brown Clement, and Charles Pickering—dissenting from the denial of the petition for rehearing en banc.

In her opinion, Judge Jones and five other judges explicitly referenced the circuit split that has developed between the reasoning of the Fifth Circuit in the *GDF Realty* case and the D.C. Circuit in the *Rancho Viejo* case that is the subject of this petition.

They state that in the *GDF Realty* panel decision, the Fifth Circuit "panel correctly determined, *unlike other courts,* that the 'regulated activity' under the ESA is Cave Species *takes*, not the appellants' planned commercial development of the land." Pet. App. 5a. (first emphasis added). The reference to "other courts" that had reached the opposite

conclusion is expressly to the *Rancho Viejo* case, which found, as noted by Judge Jones, "that the regulated activity was not the ESA take but rather the 'construction of a commercial housing development.'" Pet. App. 6a. (citing *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003)).

Judge Jones' opinion explains that the Fifth Circuit panel's constitutionally-mandated analysis—that the Commerce Clause analysis must center on the actual Cave Species take rather than the peripheral planned commercial development—is at odds with the Fifth Circuit's conclusion. The result (which would likewise occur if the D.C. Circuit's constitutionally-impermissible and conflicting analysis were employed) is "constitutionally limitless" and "a remote, speculative, attenuated, indeed more than improbable connection to interstate commerce." Pet. App. 3a.

Taken together, a majority of the active judges on the Fifth Circuit—the 3 panel judges, plus the six judges joining Judge Jones' opinion dissenting from the denial of the en banc rehearing petition—has adopted reasoning of fundamental constitutional significance which is in direct conflict with the D.C. Circuit's in *Rancho Viejo*, and has expressly acknowledged the split between the circuits with respect to this critical reasoning.

The explicitly-acknowledged circuit split is an "intervening circumstanc[e] of a substantial ... effect" that warrants rehearing under Rule 44.2. *Cf. Clark v. Manufacturers Trust Co.*, 338 U.S. 241 (1949); *Sanitary Refrigerator Co. v. Winters*, 280 U.S. 30, 34 n. (1929) (noting in both cases that the petition for rehearing and previously-denied petition for certiorari were granted because of intervening development of a circuit split).

2. Judge Jones' opinion has highlighted the inconsistency between the D.C. Circuit's decision below and this Court's decisions in *Lopez*, *Morrison*, and *SWANCC*.

Judge Jones' opinion dissenting from the denial of the petition for rehearing en banc in the *GDF Realty* case also highlights how fundamentally—despite their contradictory reasoning—the decisions in both *GDF Realty* and *Rancho Viejo* are at odds with the Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598 (2000), and *Solid Waste Agency of Northern Cook County. v. U. S. Army Corps of Engineers*, 531 U.S. 159 (2001). The Fifth Circuit "panel's 'interdependent web' analysis of the Endangered Species Act," she wrote, "gives ... subterranean bugs federal protection that was denied the school children in *Lopez* and the rape victim in *Morrison*." Pet. App. 3a. Judge Jones properly concluded that "the panel's commerce clause analysis is in error," and later that the panel's broad interpretation of the aggregation principle "would not only sustain every conceivable application of the ESA, but entirely undercuts *Lopez* and *Morrison*." *Id.* at 3a, 6a. *See also id.* at 12a n.6 (noting that the panel's decision is also "contrary" to *SWANCC*).

As Rancho Viejo noted in its certiorari petition, the same conflict exists here between the decisions of this Court cited by Judge Jones and the D.C. Circuit's decision below. Rehearing is therefore warranted to consider the inconsistency between the D.C. Circuit's decision below and the controlling precedent of this Court, in light of the now broader acknowledgement of that inconsistency presented by Judge Jones' opinion.

3. A petition for writ of certiorari in *GDF Realty* will soon be presented to this Court.

Counsel for GDF Realty has advised the undersigned counsel that GDF Realty intends to file a petition for a writ

of certiorari in that case. Pet. App. 14a. The *GDF Realty* case involves the identical issues that were raised by Rancho Viejo in the present case. Rehearing is thereby warranted pending resolution of the petition for certiorari in *GDF Realty*. *See, e.g., Pickett v. Union Terminal Co.*, 314 U.S. 704 (1941) (granting petition for rehearing and previously-denied petition for certiorari in order to consolidate with case addressing same issue); *Bowden v. Fort Smith*, 315 U.S. 793 (1942) (same); *Helvering v. Sprouse*, 316 U.S. 656 (1942) (same); *see also Forgett v. United States*, 390 U.S. 203 (1968) (granting petition for rehearing, vacating order denying certiorari, then granting petition for certiorari, vacating lower court decision and remanding for further consideration in light of intervening decision); *Simmons v. Sea-Land Services, Inc.*, 462 U.S. 1114 (1983) (same); *Florida v. Rodriguez*, 461 U.S. 940 (1983) (same). Indeed, in *United States v. Ohio Power Co.*, 351 U.S. 980 (1956), this Court sua sponte vacated a prior order denying a petition for rehearing and withheld judgment on the petition for rehearing so that the case might be disposed of consistently with two companion cases in which certiorari had been granted six months after the petition for rehearing had initially been denied. After the companion cases were decided, this Court then granted the petition for rehearing in *Ohio Power*, vacated the earlier order denying certiorari, granted the petition for certiorari, and reversed the judgment of the lower court in order to reconcile the outcome in the case with the decisions subsequently rendered by the Court. *Id.*, 353 U.S. 98 (1957).

The denial of certiorari should therefore be reconsidered so that this case can be heard—or at least held, *see Forgett v. United States*, 390 U.S. 203 (1968); *Ohio Power*, 351 U.S. at 980—and resolved simultaneously with the *GDF Realty* case.

CONCLUSION

For the reasons stated above, the petition for rehearing should be granted, the decision entered March 1, 2004 denying the petition for writ of certiorari should be vacated, and the petition for writ of certiorari should be granted or, alternatively, held pending resolution of the forthcoming petition for writ of certiorari in *GDF Realty*.

Respectfully submitted,

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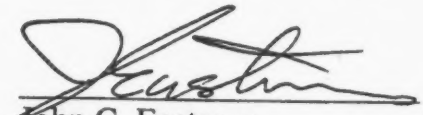
DATED: March 25, 2004

CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.



John C. Eastman
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APPENDIX A

United States Court of Appeals,
Fifth Circuit.

GDF REALTY INVESTMENTS, LTD.; Parke Properties I, LP; Parke Properties II, LP,
Plaintiffs-Appellants,
v.
Gale A. NORTON, Secretary, U.S. Department of the Interior; Marshall P. Jones,
Director, U.S. Fish & Wildlife Service, Defendants-Appellees.

No. 01-51099.

Feb. 27, 2004.

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Melinda E. Taylor, Env. Defense, Austin, TX, Michael J. Bean, Env. Defense, Michael P. Senatore, Defenders of Wildlife, Washington, DC, for Environmental Defense and Defenders of Wildlife, Amici Curiae.

Appeal from the United States District Court for the Western District of Texas; Sam Sparks, Judge.

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion March 26, 2003, 5th Cir., 326 F.3d 622)

Before DAVIS, BARKSDALE and DENNIS, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R.APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

EDITH H. JONES, Circuit Judge, joined by E. GRADY JOLLY, JERRY E. SMITH, DeMOSS, EDITH BROWN CLEMENT and PICKERING, Circuit Judges, dissenting from the denial of rehearing en banc:

A majority of the court has refused to rehear this significant Endangered Species Act case en banc. I respectfully dissent. For the sake of species of 1/8-inch-long cave bugs, which lack any known value in commerce, much less inter-

state commerce, the panel crafted a constitutionally limitless theory of federal protection. Their opinion lends new meaning to the term reductio ad absurdum.

The panel holds that because "takes" of the Cave Species ultimately threaten the "interdependent web" of all species, their habitat is subject to federal regulation by the Endangered Species Act. Such unsubstantiated reasoning offers but a remote, speculative, attenuated, indeed more than improbable connection to interstate commerce. Chief Justice Marshall stated in Cohens v. Virginia 19 U.S. 264 (1821), that Congress has no general right to punish murder or felonies generally. Surely, though, there is more force to an "interdependence" analysis concerning humans, and thus a more obvious series of links to interstate commerce, than there is to "species." Yet the panel's "interdependent web" analysis of the Endangered Species Act gives these subterranean bugs federal protection that was denied the school children in Lopez and the rape victim in Morrison The panel's commerce clause analysis is in error.

I. Background

To recap the facts, this case involves a 20-year effort to develop a large tract of land west of Austin, Texas. This once-rural property contains a cluster of limestone caves. After obtaining all necessary state and local permits, the landowner-appellants began commercial development. Between 1988 and 1993, however, the United States Fish and Wildlife Service ("FWS"), designated six species ("Cave Species") of tiny bugs, which dwell solely in the caves and never emerge on the surface of the land, as endangered under section 4 of the ESA. *See* 16 U.S.C. § 33(a)(1). Pursuant to section 9(a)(1) of the ESA, it became unlawful to take a member of the endangered species. A "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect...." 16 U.S.C. § 1532(19). The ESA broadly defines "harm" as including significant modifications or degradations of a habi-

tat which kill or injure protected wildlife "by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3.

After years of wrangling with and attempting to appease the FWS, the landowners remained unable to commercially develop their land. Accordingly, they sued on the theory that the ESA "take" provision is unconstitutional as applied to these Cave Species. The district court granted summary judgment to FWS, finding that it would be "hard-pressed to find a more direct link to interstate commerce than a Wal-Mart." GDF Realty Investment, Ltd. v. Norton, 169 F.Supp.2d 648, 662 (W.D.Tex.2001). On appeal, the panel affirmed the district court's judgment on wholly different grounds.

II. Discussion

Congress's power "to regulate commerce ... among the several states ..." is, like all enumerated powers, subject to outer limits. See United States v. Lopez, 514 U.S. 549, 556-57 (1995); Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 173 (2001) (reiterating that "the grant of authority to Congress under the commerce clause, though broad, is not unlimited"). The commerce clause "may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." NLRB v. Jones and Laughlin Steel, 301 U.S. 1, 37 (1937).

It is unnecessary to recapitulate the Supreme Court's Lopez and Morrison cases at any length. See, generally, United States v. Morrison, 529 U.S. 598 (2000). Lopez defines three categories of federal regulation that are consistent with the commerce clause. Lopez 514 U.S. at 558. At issue here is whether federal regulation of the Cave Species is permissible

under the third Lopez category—*i.e.*, whether takes of the Cave Species "substantially affect interstate commerce." Lopez, 514 U.S. at 558-59.[1]

In Lopez, reiterated in Morrison, the Court outlined four considerations in deter mining whether purely intrastate activity substantially affects interstate commerce: (1) the commercial or economic nature of the intrastate activity; (2) the presence of a jurisdictional element in the statute; (3) the existence of congressional findings or legislative history demonstrating a link between the regulated activity and interstate commerce; and (4) how attenuated is the link between the intrastate activity and its effect on interstate commerce. See Morrison, 529 U.S. at 609-12 (2000).[2]

In certain instances, an intrastate activity alone may substantially affect interstate commerce. See Jones and Laughlin Steel, 301 U.S. at 22 (NLRB order concerning unfair labor practices at a steel mill directly affected interstate commerce). In other instances, "the regulation can reach intrastate commercial activity that by itself is too trivial to have a substantial effect on interstate commerce but which when aggregated with similar and related activity, can substantially affect interstate commerce." United States v. Ho, 311 F.3d 589, 599 (5th Cir.2002); see also Wickard v. Filburn, 317 U.S. 111, 127-28 (1942).

As an initial matter, the panel correctly determined, unlike other courts, that the "regulated activity" under the ESA is Cave Species takes, not the appellants' planned commercial development of the land. GDF Realty, 326 F.3d at

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[1] The panel found, and the parties do not dispute, that the first two *Lopez* categories, involving the channels or instrumentalities of interstate commerce, do not justify regulation of the Cave Species. GDF Realty, 326 F.3d at 629.

[2] Pertinent parts of the Endangered Species Act contain no statutory jurisdictional link between federal regulation and interstate commerce. Likewise, legislative history and congressional findings fail to tie species protection to commerce. These parts of the analysis concerning federal regulation of intrastate activity do not favor FWS.

633-34 (recognizing that "looking beyond the regulated activity ... would 'effectually obliterate' the limiting purpose of the Commerce Clause") (citing Jones and Laughlin Steel, 301 U.S. at 37); Ho, 311 F.3d at 602 (recognizing that the regulated activity at issue was asbestos removal, rather than the plaintiff's commercial enterprise); but see Rancho Viejo, LLC v. Norton, 323 F.3d 1062 (D.C.Cir.2003) (finding that the regulated activity was not the ESA take but rather the "construction of a commercial housing development").

Next the panel examined whether Cave Species takes, alone, have a "direct relationship" with and substantial effect on interstate commerce. GDF Realty, 326 F.3d at 637. FWS offered two theories for such a "direct relationship:" (1) the "substantial" scientific interest the Cave Species generate; and (2) possible future commercial benefits. The panel properly rejected each argument as speculative or too attenuated to commerce.

The panel finally turned to FWS's argument that Cave Species takes, although intrastate and non-economic in themselves, may be aggregated with all other endangered species, permitting the entirety of the regulatory scheme to pass constitutional muster.[3] "At issue is what circumstances must be present in order to justify aggregation when, as in this case, intrastate activity has a *de minimis* effect on interstate commerce." GDF Realty, 326 F.3d at 638. The panel concluded that this case warranted aggregation under Lopez and Morrison, because FWS's actions are essential to preserving an "economic" regulatory program. Id. at 639. I respectfully disagree. The panel's approval of aggregation in this case would not only sustain every conceivable application of the ESA, but entirely undercuts Lopez and Morrison.

To explain the problem, a brief historical review of the aggregation principle is required. This court recognized in

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[3] FN3. The appellants concede that, if aggregated with all endangered species, the Cave Species takes would have a substantial effect on interstate commerce.

Ho that the aggregation principle "reached its zenith in Wickard, 'perhaps the most far-reaching example of commerce clause authority over intrastate activity.'" Ho, 311 F.3d at 599 (quoting Lopez, 514 U.S. at 560). In Wickard, the Supreme Court upheld regulation of an intrastate farmer's personal consumption of home- grown wheat under the Agricultural Adjustment Act of 1938 because, "... his contribution [to the wheat market], taken together with that of many others similarly situated, is far from trivial." Wickard, 317 U.S. at 127-28. A primary purpose of the act in question was, as the Court noted, "to increase the market price of wheat and to that end to limit the volume thereof that could affect the market." Id. at 90.

After Wickard, the Court has sustained commerce clause legislation using aggregation in instances where Congress was regulating commercial activity. See Katzenbach v. McClung, 379 U.S. 294 (1964) (prohibiting refusal of restaurant service to interstate travelers); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (prohibiting refusal of hotel accommodations to interstate travelers); Maryland v. Wirtz, 392 U.S. 183 (1968) (regulating wages of employees of business engaged in interstate commerce); Perez v. United States, 402 U.S. 146 (1971) (regulating loan sharking); Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264 (1981) (regulating coal industry); see Lopez, 514 U.S. at 560 (recognizing these "examples are by no means exhaustive, but the pattern is clear").

In both Lopez and Morrison, by contrast, the federal government's efforts to sustain non-economic criminal laws under the commerce clause through aggregation were rebuffed. In Lopez, only Justice Breyer's dissent accepted the theory that discrete instances of gun possession in a school zone, when aggregated, increased the costs of crime and reduced national productivity so as to justify the Gun-Free School Zones Act of 1990. See Lopez, 514 U.S. at 618-624 (Breyer, J. dissenting). The Court majority rejected aggregation, because it would allow Congress to regulate "all activities that

might lead to violent crime, regardless of how tenuously they relate to interstate commerce." Id. at 564. The Court concluded that, "if we were to accept the government's arguments. we are hard pressed to posit any activity by an individual that Congress is without power to regulate." Id.

Likewise, in Morrison, the Court rejected arguments concerning the aggregate effects of sex-based crime on national productivity, increased medical and other costs, and a decreased supply and demand for interstate goods. Morrison, 529 U.S. at 615. Again, the Court concluded that aggregation "would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit or consumption." Id. (adding that "the concern we expressed in Lopez that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well-founded") (citing Lopez, 514 U.S. at 564).

Together, these cases strongly suggest that when the Supreme Court has sustained Commerce Clause regulation under the aggregation principle, "the regulated activity was of an apparent commercial character." Morrison, 529 U.S. at 611. Nevertheless, Morrison declined to create a categorical rule "against aggregating the effects of non-economic activity," even as it observed, "thus far in our nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where the activity is economic in nature." Id. at 613.

The panel recognized that "[i]n light of Lopez and Morrison, the key question for purposes of aggregation is whether the nature of the regulated activity is economic." GDF Realty, 326 F.3d at 630. The panel conceded that "in a sense, Cave Species takes are neither economic nor commercial. There is no market for them; any future market is conjecture." GDF Realty, 326 F.3d at 638. The panel added that "[i]f the speculative future medical benefits from Cave Species makes their regulation commercial, then almost anything

would be." Id. Furthermore, "there is no historic trade in the Cave Species, nor do tourists come to Texas to view them." Id. Finally, the panel rejected the government's argument that Cave Species takes become commercial in character once aggregated with other endangered species. Id. "To accept such a justification would render meaningless any 'economic nature' prerequisite to aggregation." Id.

Nevertheless, the panel aggregated the Cave Species takes with all takes of all endangered species because: (1) they are part of a larger regulation that is "directed at activity that is economic in nature" and (2) the intrastate activity (Cave Species takes) is an "essential part of the economic regulatory scheme." Id. at 639 (internal citations and quotations omitted).

How the panel's conclusion follows from its generally excellent preceding discussion of Lopez and Morrison, I cannot fathom. The panel offers little reasoning why any take of a Cave Species is (a) part of a larger "economic" regulatory scheme; (b) so essential to the larger national scheme that the accidental crushing of one Cave Species underfoot (or even the diminutive species' destruction) threatens to undo the national program; and (c) so significant to the commerce clause that Congress, for the first time in U.S. history, is authorized to aggregate purely intrastate, non-economic activity.

It is undeniable that many ESA-prohibited takings of endangered species may be regulated, and even aggregated, under Lopez and Morrison because they involve commercial or commercially-related activities like hunting, tourism and scientific research. On this basis, the Fourth Circuit decision in Gibbs v. Babbitt, 214 F.3d 483, 493-96 (4th Cir.2000), approved federal red wolf regulations. Under reasoning like that in Gibbs, aggregation may be sustained on a species-by-species basis or across certain categories of species. The pursuit of hunting trophies, for instance, affects markets for hunting, outfitting, taxidermy, etc. Where the link between endangered species takes and commercial or economic activ-

ity is plain, courts need not be concerned about the limits of the aggregation principle.

But in this case, there is no link—as the panel concede—between Cave Species takes and any sort of commerce, whether tourism, scientific research, or agricultural markets. Compare Gibbs, 214 F.3d at 493-95. The cautions expressed in Morrison about aggregation of wholly intrastate non-economic activity should be taken seriously by the courts. See GDF Realty, 326 F.3d at 628. Elsewhere in its opinion, the panel was quite emphatic about this, saying "the possibility of future substantial effects of the Cave Species on interstate commerce ... is simply too hypothetical and attenuated from the regulation to pass constitutional muster." Id. (citing Morrison, 529 U.S. at 612) (emphasis in original).

When the panel nevertheless approves the application of the ESA to these Cave Species, its opinion becomes confusing and self-contradictory. First, the panel attempts to convert the ESA to an economic regulatory statute by opining that the majority of species takes would result from economic activity, and "the Cave Species takes would occur as a result of plaintiffs' planned commercial development." GDF Realty, 326 F.3d at 639. The panel had, however, rejected this argument earlier, when it found that the regulated activity is the take, not the planned commercial land development. GDF Realty, 326 F.3d at 633-34. As the panel itself understood, this "analysis would allow application of otherwise unconstitutional statutes to commercial actors, but not non-commercial actors. There would be no limit to Congress' authority to regulate intrastate activities, so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce." Id. at 634.[4]

Second, the panel states that Cave Species takes are essential to the ESA, because any take of any species

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[4] Arguably, Congress could pass a statute prohibiting anyone engaged in interstate commerce from "taking" endangered species. But Congress did not do so in these parts of the statute.

"threaten[s] the interdependent web of all species." GDF Realty, 326 F.3d at 640 (internal quotations omitted). Under the panel's approach, "the essential purpose of the ESA is to protect the ecosystems upon which we and other species depend." Id. (quoting H.R.Rep. No. 93-412, at 10). Further, every take is "essential" to the ESA because the extinction of any species risks the extinction of all species, and the extinction of all species could lead to the extinction of ecosystems. GDF Realty, 326 F.3d at 640. At one level, this is no more than the "but-for-causal chain" approach twice rejected by the Supreme Court in Lopez and Morrison. Hence, "the Lopez Court declined to apply the aggregation principle in conjunction with long chains of causal inference that would have been necessary to arrive at a substantial effect on interstate commerce." United States v. Wang, 222 F.3d 234, 239 (6th Cir.2000). An even more obvious dissonance between the panel opinion and Lopez, Morrison and the Constitution is that the Commerce Clause regulates commerce, not ecosystems.[5]

Third, while the panel acknowledges the Supreme Court's concern that federal legislation under the Commerce Clause must have a limiting principle so as not to obliterate the distinction between that which is truly national and that which is local, the panel's conclusion tramples that precept. The panel concludes, summarily, that its "interdependent web"

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[5] That a true, not merely conjectural, economic activity must be the subject of Congress's regulation is reinforced by our court's debates over the Hobbs Act. In United States v. Robinson, 119 F.3d 1205 (5th Cir.1997), the panel reasoned that any robbery of a business that has an effect on interstate commerce under the Hobbs Act's express jurisdictional requirements may be aggregated with other similar crimes for purposes of establishing a "substantial effect." Here, there is no jurisdictional element, and the only aggregate effect articulated by the panel is on biodiversity, which the panel somehow equates with "economic" or commercial activity. It seems clear, though, that biodiversity is a condition of nature, not a human activity. The panel's opinion goes farther than Robinson in permitting aggregation to overcome a commerce clause challenge.

approach "will not allow Congress to regulate land use or wildlife preservation." GDF Realty, 326 F.3d at 640. I disagree. Once the FWS designates a species as endangered, the Government has functional control over the land designated as its habitat. If such authority is not justified by a federal interest in regulating interstate commerce, it "would result in a significant impingement of the States' traditional and primary power over land and water use." Solid Waste Agency, 531 U.S. at 173-74.[6]

Perversely, federal protection of the Cave Species has become a device to thwart not only these appellants' prospects of land development but also the State's construction of a highway, the quintessential modern artery of commerce. See "Dateline Texas: Officials at Odds over Spider Habitat," Houston Chron., Feb. 22, 2004, at 35A (to get federal approval for highway construction over two limestone caverns housing the Cave Species, "state highway administrators must find a site in Williamson County that is also home to the endangered species and permanently preserve that site").

The panel also concludes, without explanation, that "the link" between Cave Species takes "and a substantial commercial effect is not attenuated." GDF Realty, 326 F.3d at 640. The panel's reasoning--all takes are essential, therefore, all takes have a substantial commercial effect--is circular.

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[6] Contrary to recent Supreme Court authority, the panel interprets the Endangered Species Act extremely broadly to permit the federal government to regulate a matter of unique local concern. See Solid Waste Agency, 531 U.S. at 172-173 (Congressional authority must be narrowly construed "where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power."). Further, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, [courts] will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress" (quoting Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)). Id. Regulation of land use is traditionally the province of state and local governments. Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 44 (1994).

Even aside from this problem, the Fifth Circuit and other courts have recognized that in an otherwise constitutional federal regulatory scheme, some applications may go too far. See e.g., United States v. Collins, 40 F.3d 95, 99 (5th Cir.1994) (robbery of an individual citizen not covered under the Hobbs Act); United States v. Wang, supra (same); United States v. Quigley, 53 F.3d 909, 910-11 (8th Cir.1995). In fact, the panel's reasoning contradicts Collins, inasmuch as it would authorize federal criminal prosecution under the ESA of a landowner, or even an FWS agent, who climbed down into one of the caves in order to study the Cave Species and crushed one. *See* 16 U.S.C. § § 1538-1540; compare Rancho Viejo, supra, 323 F.3d at 1080 (Ginsburg, J., concurring) ("... our rationale for concluding the take of the arroyo toad affects interstate commerce does indeed have a logical stopping point ... Just as important, however, the lone hiker in the woods, or the homeowner who moves dirt in order to landscape his property, though he takes the toad, does not affect interstate commerce.").

In the end, the panel is unable to refute the attenuation concern of Lopez and Morrison because its analysis rests on the false implication that all takes of all species necessarily relate to an ecosystem, which by its very grandiosity must at some point be "economic" in actuality or in effect. This is precisely the reasoning rejected by the Supreme Court. Not all crime is "economic" for commerce clause purposes, in actuality or effect, even though any or all of its human victims may become impoverished. Not all crimes against women are "economic" in practicality or effect, despite the same possible consequences. The Commerce Clause does not regulate crime, sexual inequity, or ecosystems as such--it regulates commerce. Thus, I reiterate: many applications of the ESA may be constitutional, but this one simply goes too far. To be faithful to the Supreme Court's principles in Lopez and Morrison and this court's Commerce Clause decisions, we should rehear this case en banc.

APPENDIX B

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March 22, 2004

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Re: GDF Realty Investments, Ltd., et al v. Gale Norton, et. al

Dear Mr. Eastman:

This letter is to confirm that on behalf of my clients, GDF Realty Investments, Ltd., Parke Properties I, L.P., and Parke Properties II, L.P., I will be filing a Petition for Writ of Certiorari in the United States Supreme Court in the matter *GDF Realty Investments, Ltd., et al v. Gale Norton, Secretary, United States Department of the Interior; and Steven A. Williams, Director, United States Fish and Wildlife Service.*

Please feel free to contact me if you have any questions.

Sincerely,
/s
Paul M. Terrill, III
Hazen & Terrill, P.C.

No. 03-761

Supreme Court, U.S.
FILED
JAN 27 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

RANCHO VIEJO, LLC,

Petitioner,

v.

GALE A. NORTON, Secretary of the Interior, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the D.C. Circuit's decision holding, on grounds that conflict with a recent decision of the Fifth Circuit, that Congress may, through the Endangered Species Act, authorize the regulation of private lands to protect against theoretical harm to the habitat of the wholly intrastate and commercially-irrelevant arroyo toad is contrary to this Court's recent Commerce Clause decisions in *United States v. Lopez*, *United States v. Morrison*, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, and *United States v. Jones*.

LIST OF PARTIES

Petitioner:	Rancho Viejo, LLC, is a California limited liability corporation that has never issued shares to the public. It does not have a parent corporation, nor is there any publicly-held company that owns ten percent or more of its stock.
Respondent:	Gale A. Norton, Secretary of the Interior; the United States Department of the Interior; the United States Fish and Wildlife Service; the United States Army Corps of Engineers; and Colonel Richard G. Thompson, Los Angeles District Commander, United States Army Corps of Engineers.
Amicus Curiae:	Mountain States Legal Foundation; the following additional entities participated as *amici curiae* in the Court of Appeals or in the District Court: the National Wildlife Federation and the Pacific Legal Foundation.

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief in support of Petitioner, Rancho Viejo, LLC. Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all the parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a non-profit, membership public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals who live and work in nearly every state of the country. A large number of MSLF's members work in businesses involved in the utilization and development of natural resources and, as a result, are involved actively in many environmental issues. Moreover, MSLF and its members have an interest in ensuring that federal laws and regulations, including the Endangered Species Act, are implemented

[1] Copies of the consent letters have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than MSLF, made a monetary contribution for the preparation or submission of this brief.

and enforced in a manner consistent with the Constitution of the United States.

SUMMARY OF ARGUMENT

The Commerce Clause gives Congress the authority to "regulate Commerce with foreign Nations, and among the several States . . . ." U.S. Const. art. I, § 8, cl. 3. The scope of congressional authority under the Commerce Clause is the subject of heated debate and litigation within the courts. In particular, the Endangered Species Act of 1973 ("ESA"), 16 U.S.C. § 1531, *et seq.*, raises concerns regarding whether various intrastate activities sufficiently affect interstate commerce to permit Congress to "regulate" them. Thus, in determining whether the Commerce Clause authorizes regulation of various endangered or threatened species under the ESA, the determinative issue is whether those species individually affect interstate commerce.

Ignoring this determinative issue and contrary to precedents of this Court, the D.C. Circuit upheld the federal government's regulation of an activity that neither affects interstate commerce nor constitutes commerce under the Commerce Clause. Specifically, the D.C. Circuit allowed the U.S. Fish and Wildlife Service (the "Service") to exceed the scope of the Commerce Clause by extending Section 9(a)(1)(B) of the ESA, 16 U.S.C. § 1538(a)(1)(B), to a wholly intrastate, non-commercial species, the southwestern arroyo toad (*Bufo microscaphus californicus*). The result is intrusion on state sovereignty, the obstruction of state control of local land use, and seemingly unlimited federal regulatory power over species. This result conflicts with precedents of this Court and of the Fifth Circuit, *e.g.*,

GDF Realty, Inc. v. Norton, 326 F.3d 622 (5th Cir. 2003), and warrants *certiorari* to limit congressional authority to regulate species solely to the extent permitted by the Commerce Clause.

ARGUMENT IN SUPPORT OF PETITION

I. THE CONSTITUTION OF THE UNITED STATES REQUIRES A DISTINCTION BETWEEN THAT WHICH IS TRULY NATIONAL AND THAT WHICH IS TRULY LOCAL.

The D.C. Circuit's holding that Congress has the authority, under the Commerce Clause of the Constitution, to authorize, through the ESA, the regulation of private lands to protect the wholly intrastate and commercially-irrelevant arroyo toad has stretched the Commerce Clause to the point of providing federal agencies unlimited power to regulate all state and local land use activity.

The D.C. Circuit's decision is based primarily on a prior decision of the Circuit in *National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) ("*NAHB*"). Pet. App. 1a-31a. In *NAHB*, by a two-to-one decision, the D.C. Circuit held that Congress has authority, under the Commerce Clause, to prohibit the private taking of an endangered species that existed wholly in one state and did not directly generate any significant interstate commerce. *NAHB*, 130 F.3d at 1046-49. The D.C. Circuit's holdings disregard totally this Court's Commerce Clause jurisprudence and will, if allowed to stand, permit

the ESA and its "take" provisions to regulate private property in every State of the Nation.[2] That is the result of the D.C. Circuit's holdings because, as Judge Wald of the D.C. Circuit noted in *NAHB*: "Approximately [half of the] species in the United States currently designated as threatened or endangered [under the ESA] are found in only one state." *NAHB*, 130 F.3d at 1052.

In *United States v. Lopez*, 514 U.S. 549 (1995), this Court held that a federal statute regulating intrastate gun possession exceeded congressional power under the Commerce Clause. This Court held that the Gun-Free School Zones Act of 1990 ("GFSZA"), which made possession of a gun within a school zone a federal offense, exceeded Congress' authority under the Commerce Clause. *Lopez*, 514 U.S. at 559-67.

This Court reasoned that such non-economic intrastate activity was outside the scope of the Commerce Clause and within the purview of State control, *Id.* at 567-68, because congressional authority under the Commerce Clause is limited to "economic activity" that has substantial effects on interstate commerce. *Id.* at 559-63.

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[2] Section 9(a)(1)(B) of the ESA makes it unlawful to "take" any species listed as endangered or threatened without a permit. 16 U.S.C. § 1538(a)(1)(B). The ESA defines "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* at § 1532(19). Moreover, "harm" has been defined to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding." 50 C.F.R. § 17.3; *see also, Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 708 (1995).

Lopez determined that, under the Commerce Clause, Congress could regulate three categories of activity: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) activities that have a substantial affect on interstate commerce. *Id.* at 558-59. This Court concluded that possession of a gun is not primarily an economic activity and, therefore, did not fall under the first two categories. *Id.* at 559. In addition, this Court determined that gun possession was not an activity that "substantially affects" interstate commerce because it was not an essential component of interstate economic activity. *Id.* at 561. Moreover, the GFSZA lacked a jurisdictional statement that would have limited its application to cases involving interstate commerce. Furthermore, Congress failed to make any findings about the affect, if any, of gun possession in school zones on interstate commerce. *Id.* at 562-64. Accordingly, gun possession within school zones did not have a substantial impact on interstate commerce. *Id.* at 567-68.

The focal point of this Court's reasoning in *Lopez* rested on the activity that was to be statutorily regulated, *i.e.*, the possession of a gun within a school zone, and not on the separate activities of the actor himself that may only involve attenuated matters of interstate commerce. In the instant case, the D.C. Circuit did not direct its attention to the activity that is to be statutorily regulated, *i.e.*, the "take" of an arroyo toad, but instead shifted its focus away from the reasoning of this Court in *Lopez* and toward the economic nature of Rancho Viejo itself. Pet. App. 16a-17a. Under this rationale of the D.C. Circuit, this Court would have been required to focus on the possessor of a gun within a school zone and whether or not that individual was involved in any activities that might affect interstate

commerce. Clearly, such a far-reaching inquiry would allow the federal government unimpeded regulatory power, including the ability to tread on areas of traditional state control, under the Commerce Clause. This was not the intention of this Court's landmark decision in *Lopez*.

In *Lopez*, this Court suggested that, whenever federal legislation attempted to regulate areas traditionally regulated by state or local governments, it would review that congressional legislation with caution. *Id.* at 557-68. Foretelling the scrutiny it would apply, this Court rejected in *Lopez* the "costs of crime" and "national productivity" justifications for the GFSZA proffered by Congress both because, had it accepted those justifications, it would be "difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign," *Id.* at 564, and because such a broad reading of the Commerce Clause would undermine the federal system of government. *Id.* at 561, n.3, 564, 567-68.

Likewise, in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), congressional authority under the Commerce Clause was also tested. In *SWANCC*, this Court addressed whether the Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("the Corps") could regulate isolated intrastate waters and wetlands that are not connected or adjacent to navigable waters "based on their actual or potential use as habitat for migratory birds." *SWANCC*, 531 U.S. at 163-64. This Court held that the migratory bird regulation was invalid because Congress did not intend to include "isolated" wetlands or waters within the term "navigable waters" when it enacted the Clean Water Act. *Id.* at 162-63.

Although the *SWANCC* decision did not decide whether federal regulation of isolated intrastate wetlands exceeded congressional authority under the Commerce Clause, this Court did suggest that the Corps' interpretation may have exceeded that authority. *Id.* at 172-73. This Court indicated that the Corps' regulation of isolated intrastate wetlands would raise serious questions under the Commerce Clause because local land use regulation is a traditional state and local function. *Id.* at 172-74. Even though previous cases had found that migratory bird protection was a "national interest of very nearly the first magnitude," this Court determined it was "not clear" whether the regulated activity or object, in the aggregate, affects interstate commerce. *Id.* at 173 (quoting *Missouri v. Holland*, 252 U.S. 416, 435 (1920)). Because there was no clear statement in the Clean Water Act that Congress intended to give the federal government authority over isolated wetlands, this Court refused to interpret the regulation to include "federal jurisdiction over ponds and mudflats falling with the 'Migratory Bird Rule' [that] would result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* at 174.

This Court's holdings in *Lopez* and *SWANCC* control in this matter. The listing of the arroyo toad as an endangered species under the ESA and the application of the ESA's "take" provisions to the toad substantially intrudes on the sovereign power of the State of California to control local land use – an area of traditional state concern. *See, FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982) (The regulation of land use is the most prominent activity of any State). Justice Kennedy, concurring in the *Lopez* decision, argued that courts should be hesitant in allowing

Congress to use the Commerce Clause as the basis for federal regulation in an "area of traditional state concern," which "States lay claim [to] by right of history and expertise." *Lopez*, 514 U.S. at 580, 583 (Kennedy, J., concurring). Justice Kennedy elaborated that, with such an expansive definition of the Commerce Clause, "the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *Id.* at 577.

Thus, the D.C. Circuit's ruling upholding the application of Section 9(a)(1)(B) of the ESA to the alleged "take" of arroyo toads by Rancho Viejo intrudes on state sovereignty and obstructs state control of local land use. Accordingly, the decision of the D.C. Circuit is inconsistent with this Court's Commerce Clause precedent and warrants *certiorari*.

II. THE AGGREGATION OF ALL ACTIVITIES BROADENS THE SCOPE OF CONGRESSIONAL AUTHORITY UNDER THE COMMERCE CLAUSE WITH NO LOGICAL STOPPING POINT.

The Commerce Clause empowers Congress to regulate three categories of activity provided that Congress identifies an adequate relationship between those categories of activity and interstate commerce. *See supra*. The D.C. Circuit ignored the limits imposed by the Commerce Clause by aggregating all of the activity, including non-economic activity, engaged in by Rancho Viejo so as to provide a basis for the D.C. Circuit's holding. Pet. App. 15a. By its aggregation of all activity, including activities of both an economic and a non-economic nature, the D.C. Circuit's limit on the scope of congressional authority under the Commerce Clause has no logical stopping point.

In *United States v. Morrison*, 529 U.S. 598 (2000), this Court held that the Violence Against Women Act ("VAWA"), a federal statute penalizing intrastate gender-based violence, intruded on traditional state authority over criminal matters and thus exceeded the scope of the Commerce Clause. This Court found that, like the GFSZA in *Lopez*, the VAWA was beyond the scope of the Commerce Clause because the activity regulated was essentially non-economic and related to interstate commerce only indirectly. *Morrison*, 529 U.S. at 613-19.

Adhering to the scrutiny utilized in *Lopez*, this Court in *Morrison* emphasized that "in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." *Id.* at 611. Furthermore, this Court "reject[ed] the argument that Congress may regulate non-economic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Id.* at 617. The reason was simple: allowing aggregation of non-economic activities to serve as a basis for regulation under the Commerce Clause would allow the federal government to regulate any and every activity. *Id.* at 615-17.

Moreover, permitting Congress, under the Commerce Clause, to justify legislation by aggregating non-economic activities would "completely obliterate the Constitution's distinction between national and local authority." *Id.* at 615. For example, the aggregation of non-economic activities could be applied just as easily "to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant." *Id.* at 615-16. *Morrison* found that the VAWA impermissibly intruded on

traditional state authority over family law and criminal issues. As in *Lopez*, this Court emphasized, in *Morrison*, that courts should carefully evaluate federal legislation that relies on the Commerce Clause for its authority because "[t]he Constitution requires a distinction between what is truly national and what is truly local." *Id.* at 599.

The D.C. Circuit's holding conflicts with the decisions of this Court in *Lopez* and *Morrison*, where the notion of aggregating all activity, including non-commercial activities, to determine whether interstate commerce is affected was rejected. *See, Lopez*, 514 U.S. at 564; *Morrison*, 529 U.S. at 615-17. Furthermore, the D.C. Circuit's holdings also conflict with that of the Fifth Circuit, which has adopted the rationale of this Court in *Lopez* and *Morrison* regarding a similar challenge under the ESA involving a wholly intrastate, non-commercial species. *See, GDF Realty, Inc. v. Norton*, 326 F.3d 622 (5th Cir. 2003). The Fifth Circuit specifically noted that Commerce Clause precedent of this Court "stand[s] against" the notion that "[n]on-economic and non-commercial activity could be aggregated" to determine a substantial effect on interstate commerce. *Id.* at 638. To hold otherwise would permit the federal government infinite authority, under the Commerce Clause, to regulate any activity. There would be no logical stopping point to federal legislation; any statute could satisfy the Constitutional limitations of the Commerce Clause.

Accordingly, *certiorari* is warranted in this case to resolve the conflict between this Court and the Circuit Courts regarding the proper and just level of economic and commercial activity that may be aggregated in determining whether the application of Section 9(a)(1)(B) of the

ESA to the arroyo toad substantially effects interstate commerce.

CONCLUSION

For the foregoing reasons, Mountain States Legal Foundation respectfully requests that this Court grant Rancho Viejo's Petition for *Writ of Certiorari*.

Respectfully submitted,

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Dated: January 28, 2004

Supreme Court, U.S.
FILED
JAN 28 2004
OFFICE OF THE CLERK

(3)

No. 03-761

IN THE

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RANCHO VIEJO, LLC,

Petitioner,

v.

GALE A. NORTON, SECRETARY OF THE INTERIOR, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

BRIEF FOR THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

This Court has held that "[t]he Constitution requires a distinction between what is truly national and what is truly local." The southwestern arroyo toad travels no more than 1.2 miles within California during its lifetime and has no commercial use. Did the court of appeals err in concluding that Congress has authority under the Commerce Clause to regulate interference with this wholly intrastate, noncommercial species?

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BRIEF FOR THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS AMICI CURIAE SUPPORTING PETITIONER

Amici curiae Washington Legal Foundation (WLF) and Allied Educational Foundation (AEF) respectfully submit that the petition for a writ of certiorari should be granted.[1]

INTEREST OF AMICI CURIAE

WLF is a nonprofit public interest law and policy center based in Washington, D.C., with thousands of supporters nationwide. WLF engages in litigation and the administrative process in a wide variety of areas, including cases involving property rights and the scope of the federal government's Commerce Clause powers. In particular, WLF has argued as *amicus curiae* in several recent cases that the commerce power does not extend to federal regulation of wild animals. *See, e.g.*, *Solid Waste Agency of N. Cook County* v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Gibbs* v. *Babbitt*, 214 F.3d 483 (4th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001); *Nat'l Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

AEF is a nonprofit charitable and educational foundation based in New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and public policy. AEF has appeared as *amicus curiae* in

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[1] Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief have been submitted to the Clerk.

many cases in which WLF is also involved, including *Gibbs* and *National Association of Home Builders*.

ARGUMENT

The court of appeals sustained, as a valid exercise of the federal government's power to regulate interstate commerce, a federal regulation that extends to the southwestern arroyo toad the protections of section 9(a)(1)(B) of the Endangered Species Act (ESA), 16 U.S.C. § 1538(a)(1)(B), which makes it unlawful to "take" any endangered species. 59 Fed. Reg. 64,859 (Dec. 16, 1994). The arroyo toad inhabits scattered areas of California, and during its lifetime, it does not range any farther than 1.2 miles from the streams in which it breeds. Pet. App. 3a-4a. The arroyo toad has no commercial use or any other links to interstate commerce. Pet. App. 39a.

Petitioner ran afoul of this prohibition on arroyo toad takes when, as part of its plan to construct a 280-home residential development in San Diego County, the company erected a fence that the Fish and Wildlife Service deemed to be an unlawful impediment to the movement of arroyo toads inhabiting the land. Pet. App. 4a-5a. Petitioner responded by challenging the constitutionality of the regulation prohibiting arroyo toad takes, arguing that it exceeds the federal government's authority under the Commerce Clause.

The court of appeals held that the regulation was constitutional because there exists a rational basis for concluding that petitioner's real-estate activities have a substantial effect on interstate commerce. Pet. App. 12a-13a. By framing the issue before it as whether the activities of petitioner substantially affect interstate commerce—rather than as whether the act of taking the arroyo toad has such an effect—the court of appeals strayed far afield from the mode of constitutional analysis that this Court has required in Commerce Clause cases.

A. In *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000), this Court refined the framework for evaluating the propriety of federal action under the Commerce Clause. The Court explained that there exist three categories of activities that Congress can regulate pursuant to its commerce power:

> First, Congress may regulate the use of the *channels of interstate commerce*. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or *persons or things in interstate commerce*, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate *those activities having a substantial relation to interstate commerce, i.e.*, those activities that substantially affect interstate commerce.

Lopez, 514 U.S. at 558-59 (citations omitted; emphases added); *see also Morrison*, 529 U.S. at 609. It is beyond *reasonable* dispute that the prohibition on arroyo toad takes regulates neither the channels nor the instrumentalities of interstate commerce. Accordingly, this provision can be sustained only if it regulates an activity that substantially affects interstate commerce.

Lopez and *Morrison* instruct that four inquiries are relevant to determining whether a regulated activity has a substantial effect on interstate commerce: (i) whether the regulation by its terms reaches commercial or economic activity; (ii) whether the regulation includes an express jurisdictional element; (iii) whether Congress has made findings regarding the regulated activity's effect on interstate commerce; and (iv) whether the link between the regulated activity and interstate commerce is direct or attenuated. *Lopez*, 514 U.S. at 559-65; *Morrison*, 529 U.S. at 610-12.

In upholding the prohibition on arroyo toad takes, the D.C. Circuit committed several serious errors in the applica-

tion of this test and engaged in a tortured analysis that undermines the limitations inherent in Congress' Commerce Clause authority. Upon a faithful application of the methodology outlined by this Court, it becomes evident that the taking of a wholly intrastate, commercially irrelevant species such as the arroyo toad does not exert a substantial effect on interstate commerce. This conclusion is not in any way altered where the entity committing the take possesses, in its own right, a substantial connection to interstate commercial activity.

1. In the course of explaining the importance of the first prong of substantial effects analysis, this Court stated in *Morrison* that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." 529 U.S. at 613. In order to circumvent the limitations inherent in this statement, the D.C. Circuit focused its analysis upon the conduct of the regulated entity—Rancho Viejo—rather than upon the expressly regulated activity—the taking of the wholly intrastate and commercially irrelevant arroyo toad. By shifting the manner in which Commerce Clause analysis is framed, the D.C. Circuit was able to reach the conclusion that this case involves the regulation of commercial activity because "the regulated activity is the construction of a 202-acre commercial housing development." Pet. App. 9a. Emphasizing Rancho Viejo's reliance upon building materials and workers that move across state lines, the court further concluded that this regulated activity has a substantial effect on interstate commerce. Pet. App. 12a-13a.

In focusing upon the commercial activities of the regulated entity itself, the D.C. Circuit relied upon the reasoning of its earlier decision in *National Association of Home Builders* v. *Babbitt* ("*NAHB*"), in which the court upheld against a Commerce Clause challenge a regulation prohibiting takes of the Delhi Sands Flower-Loving Fly—a species that, like the arroyo toad, is wholly intrastate and commercially irrelevant.

130 F.3d 1041 (D.C. Cir. 1997). The court determined that the prohibition regulated activity that exerted a substantial effect on interstate commerce because the take was occasioned by the redesign of a traffic intersection to facilitate emergency access to a hospital. *Id.* at 1059 (Henderson, J., concurring); *see also id.* at 1056. The D.C. Circuit's reasoning in both of these decisions is fatally flawed, however, and inconsistent not only with *Lopez* and *Morrison* but also with a recent Fifth Circuit decision that perceptively identified the constitutional infirmities inherent in the D.C. Circuit's Commerce Clause analysis. *See GDF Realty Invs., Ltd.* v. *Norton*, 326 F.3d 622 (5th Cir. 2003).

In *Lopez*, the Gun-Free School Zones Act made it illegal for "any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(1)(A). The Court explained that this is "a criminal statute that *by its terms* has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 514 U.S. at 561 (emphasis added). In framing its Commerce Clause inquiry, the Court looked at the activity that the statute, by its terms, expressly regulated, and concluded that commerce was not implicated because the relevant activity for Commerce Clause purposes was the carrying of a gun in a school zone. The fact that the defendant to whom the statute was being applied was engaged in commerce—he had brought the gun to school to sell it—did not alter the Court's conclusion that the statute did not regulate commercial activity. *See United States* v. *Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993).

Similarly, in *Morrison*, the provision of the Violence Against Women Act therein under consideration provided a federal civil remedy for the victims of gender-motivated violence. 42 U.S.C. § 13,981. In undertaking the first step in its substantial effects analysis, this Court concluded that "[g]ender-motivated crimes of violence are not, in any sense

of the phrase, economic activity." *Morrison*, 529 U.S. at 613. Again, this Court framed its analysis in the terms of the statute itself and paid no heed to the activities in which the regulated individual was engaged.

In this case, the D.C. Circuit ignored this Court's clear guidance on the manner in which to frame a Commerce Clause inquiry. The regulation herein at issue proscribes takes of the arroyo toad. The ESA defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in such conduct." 16 U.S.C. § 1532(19). By its own terms, the regulation proscribes the act of taking an arroyo toad, and the relevant question for Commerce Clause purposes is therefore whether a toad take constitutes commercial or economic activity (and whether that activity has a substantial effect on interstate commerce). The answer to this question is clearly "no." The arroyo toad lives its entire life within several acres of California brush, and it is not the object of any commerce. Accordingly, the prohibition on arroyo toad takes regulates an activity that has neither commercial nor interstate attributes.

In clear contravention of this Court's precedent, however, the D.C. Circuit framed the issue before it as whether Rancho Viejo's real-estate development activities, which precipitated the take, were commercial or economic. Following the D.C. Circuit's reasoning to its logical conclusion leads to the palpably erroneous proposition that Congress has the authority to regulate any local activity engaged in by an entity with links to interstate commerce, while it lacks the authority to regulate the same local activity when it is undertaken by an entity without such a commercial connection. *See GDF Realty*, 326 F.3d at 634 (disavowing the D.C. Circuit's mode of framing Commerce Clause issues, and explaining that accepting such a framework "would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors").

Under such a Commerce Clause methodology, the prohibition on arroyo toad takes would be a permissible regulation of interstate commercial activity when applied to a real-estate developer or a trucking company but would be an unconstitutional usurpation of state authority when applied to a local homeowner who interferes with the arroyo toad's habitat to build a treehouse for his children. Indeed, Chief Judge Ginsburg, concurring in the D.C. Circuit's decision, admitted as much. He wrote:

> Our rationale is that, with respect to a species that is not an article in interstate commerce and does not affect interstate commerce, a take can be regulated if—but only if—the take itself substantially affects interstate commerce. The large-scale residential development that is the take in this case clearly does affect interstate commerce. Just as important, however, the lone hiker in the woods, or the homeowner who moves dirt in order to landscape his property, though he takes the toad, does not affect interstate commerce.

Pet. App. 30a-31a (Ginsburg, C.J., concurring). But whether a fence effecting a take of the arroyo toad can be regulated under the Commerce Clause should not depend on the mere fortuity of who built the fence. This Court made no such distinction in *Lopez* and *Morrison*, where it sustained facial challenges to the statutes under consideration. *See GDF Realty*, 326 F.3d at 635 (explaining that "the facial challenges in *Lopez* and *Morrison* would have failed" under the mode of analysis employed by the D.C. Circuit).

In *GDF Realty*, the Fifth Circuit heard a Commerce Clause challenge to a regulation prohibiting takes of six endangered subterranean species ("the Cave Species"). Each of these species lives in a small area of Texas, and none of them is the object of any commercial activity. *Id.* at 625, 637. The district court, relying upon the same mode of analysis as that

employed by the D.C. Circuit, had rejected a Commerce Clause challenge on the ground that the plaintiffs were contemplating a take of the Cave Species as part of the construction of a Wal-Mart, which constituted a commercial activity that exerted a substantial effect on interstate commerce. *Id.* at 627. The court of appeals held that the trial court erred by focusing upon the plaintiffs' motivations as part of its substantial effects analysis. *Id.* at 636. The court explained that in Commerce Clause cases "the scope of inquiry is primarily whether the *expressly regulated activity* substantially affects interstate commerce, *i.e.*, whether takes, be they of the Cave Species or of all endangered species in the aggregate, have the substantial effect." *Id.* at 633. Pursuant to this analysis, the court concluded that the act of taking a Cave Species organism does not constitute commercial activity and that the regulated entity's participation in interstate commerce does not alter that result. The court explained:

> Neither the plain language of the Commerce clause, nor judicial decisions construing it, suggest that, concerning substantial effect *vel non*, Congress may regulate activity (here, Cave Species takes) solely because non-regulated conduct (here, commercial development) by the actor engaged in the regulated activity will have some connection to interstate commerce.

Id. at 634; *see also United States* v. *Stewart*, 348 F.3d 1132 (9th Cir. 2003) (holding that a federal statute prohibiting the possession of machineguns contravened the Commerce Clause when applied to a defendant who assembled a homemade weapon for his own collection, notwithstanding the fact that the defendant also sold rifle kits over the Internet and thus had significant connections with interstate commerce).

When the holdings of this Court in *Lopez* and *Morrison*–and the Fifth Circuit's faithful application of those decisions in *GDF Realty*—are brought to bear on the facts of this case,

it becomes readily apparent that the D.C. Circuit incorrectly framed its Commerce Clause inquiry by focusing upon Rancho Viejo's commercial attributes rather than upon the lack of a nexus between arroyo toad takes and interstate commerce. This Court should grant certiorari to resolve this conflict among the lower courts and to clarify the object of the "economic activity" prong of Commerce Clause analysis.

2. The second aspect of substantial effects analysis is an inquiry into whether the statute or regulation includes an express jurisdictional element limiting its reach to matters that impact interstate commerce. The regulation precluding arroyo toad takes does not include any language limiting its reach to takes that have the requisite nexus to interstate commerce. The D.C. Circuit glossed over this shortcoming, stating that "*Lopez* did not indicate that such a hook is required, however, and its absence did not dissuade the *NAHB* court from finding application of the ESA constitutional." Pet. App. 10a.

While the D.C. Circuit is correct that this Court has never held that an express jurisdictional element is a prerequisite to constitutionality, the inclusion of a clause limiting this regulation's reach to arroyo toad takes that possess a connection with interstate commerce would save the provision from facial invalidity. If this regulation, by its terms, proscribed only that hypothetical category of arroyo toad takes that exert a substantial effect on interstate commerce, a court would be required to engage in a case-by-case inquiry into whether, under the specific factual circumstances before it, the requisite connection with interstate commerce was present (notwithstanding the fact that one would be hard-pressed to conceive of a scenario under which an arroyo toad take would actually manifest such a connection). *See Lopez*, 514 U.S. at 561-62. The absence of a jurisdictional element extends the reach of this regulation to all arroyo toad takes—including those that lack the constitutionally mandated nexus with interstate commerce—and results in a regulation that

does not fall within the purview of Congress' Commerce Clause authority.

3. The third factor that a court must weigh as part of its substantial effects analysis is whether Congress made legislative findings regarding the manner in which the regulated activity impacts interstate commerce. There are no legislative findings that address the connection between arroyo toad takes and interstate commerce. Indeed, the prohibition on toad takes was not even enacted by Congress; rather, it was promulgated by unelected officials in the Fish and Wildlife Service. While "[d]ue respect for the decisions of a coordinate branch of Government demands that [this Court] invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds," *Morrison*, 529 U.S. at 607, there is no similar constraint on this Court where it is confronted with a constitutionally suspect agency regulation, *see Solid Waste Agency of N. Cook County* v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*").

As with the absence of a jurisdictional element, the D.C. Circuit accorded little weight to the lack of legislative findings. The court explained that no such findings were necessary because the significant connection between the construction of a housing development and interstate commerce is visible to the naked eye. Pet. App. 10a-11a. While this assertion may or may not be true, it is completely irrelevant to the question that the D.C. Circuit should have been addressing, which is whether the taking of the wholly intrastate, commercially irrelevant arroyo toad has a substantial effect on interstate commerce. The absence of legislative findings on this point is critical because it is certainly not evident "to the naked eye" that the act of interfering with the habitat of a toad that lives its entire life within a few acres of California brush and that is not the object of commercial transactions exerts a substantial effect on interstate commerce. *Cf. Lopez*, 514 U.S. at 563 ("to the extent that congressional findings

would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here").

4. The final issue that must be considered by a court engaged in substantial effects analysis is whether the link between the regulated activity and interstate commerce is so attenuated that there exists no logical stopping point to Congress' commerce power. *See id.* at 567 (explaining that it is impermissible for a court, in an effort to discern a link between a regulated activity and interstate commerce, to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States"). Relying again upon its incorrect framing of the issue in this case, the D.C. Circuit determined that no attenuation problem hampers the regulation prohibiting arroyo toad takes. In formulating this conclusion, the court explained that "the rationale upon which we rely focuses on the activity that the federal government seeks to regulate in this case (the construction of Rancho Viejo's housing development)." Pet. App. 11a. Accordingly, the D.C. Circuit had no concerns about attenuation because it concluded that Rancho Viejo's real-estate activities have a direct impact on interstate commerce due to the use of materials and workers that have traveled across state lines. Pet. App. 12a.

If the substantial effects inquiry is reframed to reflect accurately the methodology outlined by this Court in *Lopez* and *Morrison*, however, significant attenuation problems emerge. Any link between destruction of the habitat of the intrastate, commercially irrelevant arroyo toad and interstate commercial activity is dangerously attenuated. If, through some Herculean feat of factual extrapolation, a court were to find that an arroyo toad take exerts a substantial impact on interstate commerce, then there would truly be no logical stopping point to confine Congress' Commerce Clause authority, and

the distinction between the sphere of the federal government and that of the states would be truly obliterated.

On the contrary, it is the states that have long enjoyed plenary authority over the wild animals within their borders. *See, e.g., Douglas* v. *Seacoast Prods., Inc.*, 431 U.S. 265, 287-88 (1977) (Rehnquist, J., concurring in part and dissenting in part) (it is "clear that the States have a substantial proprietary interest . . . in the fish and game within their boundaries"). The broad scope of state authority in this realm contrasts sharply with the narrow reach of the federal government, which is limited to regulating wild animals through invocation of its enumerated powers. *See, e.g., id.* (holding that the commerce power authorizes the regulation of animals within the nation's territorial waters (*i.e.*, the channels of commerce)); *North Dakota* v. *United States*, 460 U.S. 300 (1983) (concluding that the spending power authorizes the federal government to acquire, by purchase or easement, private land that may be used as animal habitat); *Kleppe* v. *New Mexico*, 426 U.S. 529 (1976) (explaining that the federal government's property power authorizes it to proscribe the harming of wild animals on federal land); *Missouri* v. *Holland*, 252 U.S. 416 (1920) (holding that the treaty power authorizes the federal government to protect animals that are the subject of international concern). This Court has never held, however, that the commerce power authorizes the federal government to regulate wild animals *qua* wild animals. To the contrary, this Court has indicated that such regulation raises serious questions under the Commerce Clause, *see SWANCC*, 531 U.S. at 173-74, and such an incident of centralization would do much to undermine the delicate federal/state balance that is the hallmark of Our Federalism.

In light of the foregoing, it is evident that—when correctly applied—each of the four factors that this Court identified in *Lopez*, and reaffirmed in *Morrison*, indicates that it is not within Congress' Commerce Clause authority to prohibit arroyo toad takes. This Court should grant certiorari to cor-

rect the D.C. Circuit's flawed analysis and to establish that it is impermissible for lower courts to circumvent the limitations on Congress' commerce power by engaging in the type of judicial legerdemain that the D.C. Circuit employed in this case.

B. The significant inconsistencies between the D.C. Circuit's decision and the Commerce Clause framework outlined by this Court in *Lopez* and *Morrison* constitute a weighty reason to grant certiorari. The split between the D.C. Circuit and the Fifth Circuit regarding the correct methodology for "framing" substantial effects analysis, as well as the sharp disagreement among both lower-court judges and legal scholars regarding the constitutionality of endangered species regulations, further demonstrate the necessity for a definitive ruling from this Court.[2]

As discussed above, the manner in which the D.C. Circuit frames its substantial effects analysis is at odds with the methodology employed by the Fifth Circuit, which has expressly disavowed the methodology employed by the D.C.

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[2] Moreover, the frequency with which the federal government invokes the ESA in the name of wholly intrastate, noncommercial species evidences the significant real-world repercussions of this issue. *See, e.g.*, Botkin, *Firth Bridge Work Still Slowed by Endangered Snails in River*, Idaho Falls Post Reg., Dec. 10, 2003, at A1 (demolition of bridge delayed while the Fish and Wildlife Service studies the impact on the Utah Valvata Snail); Kresge, *Fontana Project Hits Old Snag; D.C. Meeting Fails to Give Any Ground for Empire Center's Impact on Endangered Flower-Loving Fly*, San Bernardino Sun, Oct. 16, 2003 (planned development placed in doubt due to the presence of the Delhi Sands Flower-Loving Fly); Witt, *A Showcase and a Battleground; Fry, Regulators at Odds over How to Protect Habitat at Golf Course*, San Jose Mercury News, July 13, 2003, at A1 (modifications to golf course required to protect the California Red-Legged Frog).

Circuit. *See GDF Realty*, 326 F.3d at 636. Judge Sentelle, dissenting from the D.C. Circuit's decision denying an en banc rehearing of this case, pointed to this circuit split, stating that the present decision "is . . . conspicuously in conflict with another circuit. The Fifth Circuit has explicitly rejected the claim that federal regulation protecting a noncommercial species is permissible if the activity constituting the 'take' was itself economic." Pet. App. 35a (Sentelle, J., dissenting from denial of rehearing en banc). Judge Roberts acknowledged the same point. Pet. App. 37a ("the approach of the panel in this case and *NAHB* now conflicts with the opinion of a sister circuit . . . ") (Roberts, J., dissenting from denial of rehearing en banc).

The methodological disagreement between the Fifth and D.C. Circuits has profound ramifications for Commerce Clause jurisprudence. Indeed, the choice between the Fifth Circuit's focus upon the commercial effects of the expressly regulated activity and the D.C. Circuit's emphasis upon the commercial attributes of the regulated entity itself is a proxy for whether this Court's recent Commerce Clause decisions are to have any enduring jurisprudential effect.

The D.C. Circuit has chosen to interpret this Court's decisions in a manner that eviscerates the constitutionally mandated limitations on the commerce power that *Lopez* and *Morrison* sought to reaffirm. *See United States* v. *Ho*, 311 F.3d 589, 597 (5th Cir. 2002) (explaining that the motivations underlying this Court's recent Commerce Clause jurisprudence included a desire to prevent the "alarming and dangerous prospect" of a completely centralized government from coming to pass, as well as a desire "to identify judicially enforceable limits on the Commerce Clause"), *cert. denied*, 123 S. Ct. 2274 (2003). Indeed, the D.C. Circuit's methodology harkens back to the pre-*Lopez* era during which Congress exercised a seemingly boundless authority under the Commerce Clause. *See* Kozinski, *Introduction to Volume 19*, 19 Harv. J.L. & Pub. Pol'y 1, 5 (1995) (writing that in the

pre-*Lopez* era the Commerce Clause should more accurately have been known as the "'Hey, you-can-do-whatever-you-feel-like Clause'"). On the contrary, the manner in which the Fifth Circuit framed its substantial effects analysis represents a faithful implementation of the guidance offered by *Lopez* and *Morrison*.

This Court should act to resolve the split between these two Circuits and to reaffirm the proposition that Congress' commerce power is not without limits. The choice between the Fifth Circuit's approach and that of the D.C. Circuit is in many ways a choice between a federal system of government—such as that endowed by the Framers—and a completely centralized national government—the dangers of which the Framers sought strenuously to guard against.

In the post-*Lopez* era, a number of lower courts have addressed the constitutionality of regulations that prohibit takes of wholly intrastate, commercially irrelevant species. *See GDF Realty Invs., Ltd.* v. *Norton*, 326 F.3d 622 (5th Cir. 2003) (Cave Species takes); *Gibbs* v. *Babbitt*, 214 F.3d 483 (4th Cir. 2000) (red wolf takes), *cert. denied*, 531 U.S. 1145 (2001); *Nat'l Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (Delhi Sands Flower-Loving Fly takes), *cert. denied*, 524 U.S. 937 (1998) ("*NAHB*"). While each such decision has ultimately sustained the regulation at issue, a number of these holdings have drawn vigorous dissents from a member of the court (and in *NAHB*, a critical separate concurrence as well). *See Gibbs*, 214 F.3d at 506 (Luttig, J., dissenting); *NAHB*, 130 F.3d at 1060 (Sentelle, J., dissenting); *id.* at 1057 (Henderson, J., concurring); *see also* Pet. App. 33a (Sentelle, J., dissenting from denial of rehearing en banc); Pet. App. 36a (Roberts, J., dissenting from denial of rehearing en banc).

Moreover, the diverging rationales adopted by the majorities in each of these decisions further evidence the confusion that this area of the law has fomented among lower

courts—and the great lengths that these courts will go to uphold endangered species protections. The Fifth Circuit, for example, upheld the prohibition on Cave Species takes because it found the regulation to be an essential part of the ESA, which it deemed to constitute an economic regulatory scheme. *See GDF Realty*, 326 F.3d at 640. The Fourth Circuit found a commercial link between red wolf takes and the tourism, scientific research, and (hypothetical) pelt trade fostered by the species and so upheld the regulation before it. *See Gibbs*, 214 F.3d at 492.[3] In *NAHB*, Judge Wald held that the prohibition on takes of the Delhi Sands Flower-Loving Fly was valid because the elimination of an endangered species "would have a staggering effect on biodiversity . . . and, thereby, on the current and future interstate commerce that relies on the availability of a diverse array of species" for their medicinal and genetic value. 130 F.3d at 1052. In upholding the regulation, Judge Wald also relied upon the rationale that endangered species takes are the product of "destructive interstate competition," in the form of a race-to-the-bottom to attract development at the expense of the environment's well-being. *Id.* at 1054. In her concurrence, Judge Henderson expressly rejected as unduly speculative Judge Wald's invocation of the present and future commerce in en-

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[3] The *Gibbs* court framed its Commerce Clause inquiry in a manner that is similar to the methodology adopted by the D.C. Circuit, and thus the Fourth Circuit is also implicated in the circuit split presented by this case. The Fourth Circuit determined that the conduct being regulated by the prohibition on red wolf takes was economic in nature because the "[f]armers and ranchers take wolves mainly because they are concerned that the animals pose a risk to commercially valuable livestock and crops." *Gibbs*, 214 F.3d at 492. By focusing upon the economic motivations of the individuals responsible for the take—rather than upon the commercial connections of the take itself—the Fourth Circuit committed the same framing error that hampered the D.C. Circuit's analysis in *NAHB* and the present case.

dangered species. *Id.* at 1058 (Henderson, J., concurring). Instead, Judge Henderson argued that the regulation was constitutional because the extinction of species will impact "land and objects that are involved in interstate commerce." *Id.* at 1059.

This disagreement among lower-court judges has been mirrored in the legal academy, with scholars both criticizing and commending the court of appeals decisions upholding endangered species regulations against Commerce Clause challenges. *Compare* Adler, *The Ducks Stop Here? The Environmental Challenge to Federalism*, 9 Sup. Ct. Econ. Rev. 205 (2001), *and* Park, *The Endangered Species Act: Does It Have a Stopping Point?*, 4 Engage 58 (2003), *with* Fitzgerald, *Seeing Red:* Gibbs v. Babbitt, 13 Vill. Envtl. L.J. 1 (2002), *and* Mank, *Protecting Intrastate Threatened Species: Does the Endangered Species Act Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?*, 36 Ga. L. Rev. 723 (2002). *See also* Saad, *Commerce Clause Jurisprudence: Has There Been a Change?*, 23 J. Land Resources & Envtl. L. 143, 172 (2003) ("The Supreme Court must give a clear directive to the lower courts on how to handle environmental regulation passed under the Commerce Clause.").

In light of the multitude of theories promulgated by judges presented with Commerce Clause challenges to prohibitions on interference with intrastate wild animals, certiorari is warranted to afford this Court the opportunity to reconcile these divisions among the federal judiciary and to properly analyze this issue under the framework set forth in *Lopez* and *Morrison*. *Cf. Cargill, Inc.* v. *United States*, 516 U.S. 955, 955 (1995) (Thomas, J., dissenting from denial of certiorari) (recognizing that "serious and important constitutional questions" about the limits of Congress' commerce power to regulate wild animals "provide a compelling reason to grant certiorari").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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January 28, 2004

Supreme Court, U.S.
FILED
JAN 28 2004
OFFICE OF THE CLERK

(5)

No. 03-761

In the

Supreme Court of the United States

RANCHO VIEJO, LLC,

Petitioner,

v.

GALE A. NORTON, Secretary of the Interior, et al.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CATO INSTITUTE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Commerce Clause confer on Congress, through the Endangered Species Act, the power to prohibit the "taking" of an intrastate, noncommercial species of toad caused by the setting of a fence on Petitioner's land?

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INTEREST OF AMICI CURIAE[1]

The Cato Institute is a nonpartisan public policy research foundation dedicated to individual liberty, free markets, and limited, constitutional government. To further those ends, Cato Institute scholars have published numerous works discussing the importance of the constitutional doctrine of enumerated powers in our federal system and, in particular, the proper scope and limits of national power under the Commerce Clause. E.g., Roger Pilon, *Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles*, 68 Notre Dame L. Rev. 507 (1993); Glenn Harlan Reynolds, *Kids, Guns, and the Commerce Clause: Is the Court Ready for Constitutional Government?* CATO Institute Policy Analysis No. 216, Oct. 10, 1994; Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 Notre Dame L. Rev. 167 (1996).

Pacific Legal Foundation was established over 30 years ago and is the largest and most experienced nonprofit legal foundation of its kind, litigating matters affecting the public interest at all levels of the federal and state courts. As a staunch advocate of limited government and individual rights, the Foundation has instituted a "federalism project" known as the Center for Constitutional Liberty. The project seeks to arrest more than a half century of national governmental expansion. The Foundation has a long history of amicus participation in this Court and was involved in the landmark Commerce Clause cases on which this case turns: *United States v. Lopez*, 514 U.S. 549 (1995) (*Lopez*), and *United States v. Morrison*, 529 U.S. 598 (2000) (*Morrison*). Among its objectives, the project seeks

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, Amici Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

to have constitutionally-derived limits imposed on federal regulation of wholly intrastate, noncommercial activity, such as the "taking" of the Arroyo toad in this case.

INTRODUCTION

This Court has never upheld a Commerce Clause regulation of an intrastate activity, based on that activity's substantial effects on interstate commerce, unless that activity was economic in nature. But the D.C. Circuit did so in this case. By looking beyond the statutorily regulated activity to the commercial nature of the underlying project, the D.C. Court of Appeals undermined this Court's Commerce Clause jurisprudence and created a conflict with the Fifth Circuit. This Court should grant the petition for writ of certiorari, therefore, to determine whether the Endangered Species Act (ESA) should be sustained in this case when the regulated intrastate activity—the "taking" of the Arroyo toad—is not itself economic in nature. A faithful reading of *Lopez* and *Morrison* will lead to the conclusion that the Act cannot be sustained as a Commerce Clause regulation of intrastate, noncommercial activities. Moreover, this is the third time this Court has been petitioned to consider the constitutionality of the ESA. It is certain that this Court will continue to be petitioned on this important question of law until it resolves the issue.

SUMMARY OF THE ARGUMENT

There are two compelling reasons for review of the D.C. Circuit opinion in this case. First, the decision "continues a line of cases in conflict with Supreme Court jurisprudence." And second, the decision is "in conflict with at least one other circuit." *Rancho Viejo v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Sentelle, J., dissenting).

Based on its prior Commerce Clause cases, in *Lopez* this Court erected a simple but solid framework for determining "substantial effects" on interstate commerce and, therefore, the constitutional validity of certain Commerce Clause enactments

like the ESA in this case. As described in *Morrison*, this framework requires a consideration of four (*Lopez*) factors: (1) Does the statute, by its terms, have anything to do with commerce or an economic enterprise; that is, does the act purport to regulate an economic activity? *Morrison*, 529 U.S. at 609-10. (2) Does the statute contain an express "jurisdictional element" which might limit its reach to a discrete set of activities that "'additionally have an explicit connection with or effect on interstate commerce?'" *Id.* at 611-12. (3) Does either the statute or "its legislative history contain express congressional findings regarding the effects upon interstate commerce" of the regulated activity? *Id.* at 612. And, (4) is the connection between the regulated activity and a substantial effect on interstate commerce attenuated? *Id.*

A straightforward application of these "*Lopez* factors" would demonstrate that the ESA, at least as applied to intrastate, noncommercial species, does not substantially affect interstate commerce. However, the lower courts have applied these factors in anything but a straightforward manner. Without exception, the lower courts have misapplied *Lopez* and *Morrison* to avoid invalidating the Act as applied in a particular case. Most commonly, the lower courts nullify the fourth *Lopez* factor by giving credence to arguments that are based on the most attenuated economic effects conceivable, such as a potential future market in the species or that harming any protected species, no matter how isolated, will diminish biodiversity and, thus, substantially affect interstate commerce. *See, e.g., National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (*Home Builders*). Likewise, the lower courts routinely change the parameters of the "substantial effects" test to justify a particular outcome. Such was the case here. The D.C. Circuit changed the first *Lopez* factor. Rather than evaluate whether the "taking" of a toad, the expressly "regulated activity," is economic in nature, the court instead looked beyond the terms of the statute to find any underlying

commercial activity that could, however coincidentally, tie the "taking" to an economic endeavor.

Not only is this approach at odds with this Court's decisions in *Lopez* and *Morrison*, it is also in conflict with another circuit. "The Fifth Circuit has explicitly rejected the claim that federal regulation protecting a noncommercial species is permissible if the activity constituting the 'take' was itself economic." *Rancho Viejo* at 1159. Therefore, to bring the D.C. Circuit in line with this Court and to resolve a circuit conflict, this Court should grant the petition for writ of certiorari.

STATEMENT OF THE CASE

Petitioner, Rancho Viejo, sought to build a residential development on 52 acres of a 202-acre site in San Diego County. *Rancho Viejo v. Norton*, 323 F.3d. 1062, 1065 (D.C. Cir. 2003). The property is bordered on one side by Keys Creek. *Id.* In furtherance of the development, Rancho Viejo erected a fence parallel to the bank of Keys Creek. *Id.* Because Arroyo toads, an endangered species, were found on the upland side of the fence, the United States Fish and Wildlife Service believed the fence impeded the movement of the toad from its upland habitat to its breeding area in the creek. Therefore, the Service informed Petitioner that the fence "'has resulted in the illegal take and will result in the future illegal take . . .'" of the Arroyo toad in violation of the ESA and must be removed. *Id.*

In response, Rancho Viejo filed a complaint for declaratory and injunctive relief in the D.C. District Court challenging the authority of the federal government to regulate the toad under the commerce power. *Id.* at 1065-66. The toad is not a commercial species. Its range is limited to 1.2 miles from the stream in which it was bred and the toad does not travel outside of the State of California. *Id.* at 1065.

Relying on the Circuit's split-panel decision in *Home Builders*, that predates this Court's decision in *Morrison*, both the district and circuit courts upheld the ESA against the constitutional challenge. The court of appeals held that because the "taking" of the toad has occurred by means of a commercial activity, a residential development project, Congress can regulate that activity under the Commerce Clause—as an activity that "substantially affects" interstate commerce. *Id.* at 1072. This approach effectively converts the commerce power into a general police power like that reserved to the states.

ARGUMENT

Whatever ambiguity may lie in this Court's landmark cases of *Lopez* and *Morrison*, this Court has been absolutely clear on one point: "[I]n those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." *Morrison*, 529 U.S. at 611.

This Court has struck down putative Commerce Clause enactments that do not purport to regulate economic activity, including a prohibition on the possession of a gun within 1,000 feet of a school (*Lopez*) and a statute authorizing civil damages for gender-motivated crimes (*Morrison*). The basis for this Court's recent rulings is clear: the Commerce Clause power has limits. It is therefore essential that this Court determine the scope of that power in the context of the ESA. That Act, more than any other, challenges the outer limits of Congress' Commerce Clause authority. As applied in this case, the ESA admits of no limits to the federal regulatory power.

I

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THIS CASE CONTINUES A LINE OF CASES IN THE D.C. CIRCUIT THAT INCREASINGLY UNDERMINES THIS COURT'S COMMERCE CLAUSE JURISPRUDENCE

The D.C. Circuit Court of Appeals diverged from this Court's modern Commerce Clause jurisprudence with its split opinion in *National Association of Home Builders v. Babbitt*, 130 F.3d 1041. That case involved the Delhi Sands Flower-loving Fly and, as in this case, the court of appeals had to determine if section 9(a)(1)(B) (16 U.S.C. § 1538(a)(1)(B)), of the ESA, exceeded Congress' Commerce Clause power as applied to an intrastate, noncommercial species. Section 9(a)(1)(B) makes it unlawful to "take" a threatened or endangered species without federal authorization. The term "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Any violation of this section is subject to both civil and criminal sanctions. *See* 16 U.S.C. § 1540.

At the time the case was brought, there were eleven known populations of the fly, all within an eight-mile radius in San Bernardino and Riverside Counties in California. The dispute arose when the United States Fish and Wildlife Service listed the fly as an endangered species and halted construction of a sorely needed hospital located in fly habitat in San Bernardino County.

The County and others sued the Service arguing, among other things, that the federal government did not have authority to regulate the "taking" of the fly—a wholly intrastate and noneconomic activity. Plaintiffs relied on this Court's landmark case in *Lopez* wherein this Court struck down the

Gun-Free Schools Zone Act as an invalid Commerce Clause enactment. Much like the "taking" of a protected species, the Act prohibited, by its terms, the mere possession of a gun within 1,000 feet of a school. Although guns are bought and sold and move across state lines, this Court held that the Act "has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez* at 561. Additionally, this Court found the Act did not contain a jurisdictional element that "would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce" or that would limit the Act's reach "to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." *Id.* at 561-62.

This Court flatly rejected the government's argument that the cost of gun-related crime in the aggregate had a substantial impact on the economy and adversely affected education. "[I]f we were to accept the Government's arguments," this Court stated, "we are hard pressed to posit any activity by an individual that Congress is without power to regulate." *Id.* at 564. This Court was simply unwilling to transform Congress' Commerce Clause authority into a general police power like that retained by the states. *Id.* at 567.

But the appellate court in *Home Builders* was not so constrained. Although that case would appear to be a precise fit with *Lopez*, the majority upheld the "take" provision of the ESA as applied to the Delhi Sands Flower-loving Fly. The majority judges in *Home Builders* could not agree on the basis for upholding the "take" provision but held variously that the protection of even noncommercial, intrastate species can be aggregated to show a connection to interstate commerce or that the ESA really regulates habitat, not just species, and that the development of such habitat is obviously connected with interstate commerce. *See Home Builders*, 130 F.3d at 1049-60. One judge even suggested, inexplicably, that the "take"

prohibition amounted to regulation of channels of interstate commerce and so could be regulated under the Commerce Clause. *Id.* at 1046-49.

But that decision was patently inconsistent with this Court's rationale in *Lopez*. Like the possession of guns in *Lopez*, on its face the "taking" of the fly in *Home Builders* had nothing to do with "commerce" or any other economic activity. Indeed, the "taking" of the fly, which was not bought and sold on the open market, had less of a connection to "commerce" than the possession of a gun, an indisputably commercial item.

Additionally, the ESA does not contain a jurisdictional element that would ensure through case-by-case inquiry that the fly, or the "taking" of the fly, would have an explicit connection to or effect on interstate commerce, a lapse fatal to the Gun-Free Schools Zone Act. Nevertheless, the court in *Home Builders* limited *Lopez* to its facts and decided the "taking" provision of the ESA, as applied to the fly, was a proper exercise of Congress' Commerce Clause power.

Following *Home Builders*, the D.C. Circuit faced another Commerce Clause challenge to the ESA in *Building Industry Association of Superior California v. Norton*, 247 F.3d 1241 (D.C. Cir. 2001). Although the court had the benefit of this Court's more recent decision in *Morrison*, which strengthened and clarified *Lopez*, the D.C. Circuit continued its divergence from this Court's Commerce Clause jurisprudence.

Morrison involved a Commerce Clause challenge to 42 U.S.C. § 13981, the Violence Against Women Act. That statute provided a federal civil remedy for the victims of gender-motivated crimes. This Court adopted *Lopez* as the proper framework for its inquiry and observed that central to the *Lopez* decision was the noneconomic nature of the statute. *Morrison*, 529 U.S. at 610.

To emphasize the point, this Court stated: "[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Id.* at 613.

Because violent acts on their face (like the "taking" of a species) had nothing to do with economic activity, this Court invalidated the challenged provision of the Violence Against Women Act. Nevertheless, the D.C. Circuit was unwilling to overrule its prior decision in *Home Builders*, but continued its slide away from this Court's jurisprudence when it considered the Commerce Clause challenge to the "take" provision of the ESA in *Building Industry Association.* That case involved ESA regulation of certain species of fairy shrimp; minute crustaceans found in puddles, water holes, and vernal pools in the California Central Valley. Like the flies in *Home Builders*, and the toads in this case, the fairy shrimp were an intrastate, noncommercial species.

The "take" provision of the ESA prohibits all harmful conduct to a listed species, however it may occur, and is not limited by its terms to economic activity. *See* 16 U.S.C. § 1532(19). Nor does the "take" provision have a jurisdictional element that ensures through case-by-case analysis that the ESA only applies to certain "takes" of species with a substantial effect on interstate commerce. *Id.* Therefore, under the *Lopez* framework, as underscored by *Morrison*, the regulation of the fairy shrimp should have been invalidated.

With the current case, however, the D.C. Circuit continues to drift even further from this Court's Commerce Clause decisions. The lower court upheld an order of the United States Fish and Wildlife Service to remove a fence from private property to facilitate the movement of Arroyo toads, a species which is not commercial and does not migrate. Thus, once again, the D.C. Circuit upholds under the commerce power the regulation of "an activity which is neither interstate nor

commerce, ..." *Home Builders*, 130 F.3d at 1061 (Sentelle, J., dissenting).

Protecting the toad from a fence erected on private property does not convert the "taking" of the toad into commercial conduct under any *Lopez* factor. As Judge Sentelle observes:

> The point in *Lopez*, as further explained in *Morrison*, is not that Congress can regulate any activity if the act of regulating catches an entity or an action that is itself commercial independent of the noncommercial nature of the regulated entity and activity. It is rather that "'[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.'"

Rancho Viejo, 334. F.3d at 1159 (Sentelle, J., dissenting to denial of rehearing en banc).

Thus, the D.C. Circuit has it backwards. The noneconomic nature of the prohibited conduct—possession of a gun—was central to this Court's decision to invalidate the Gun-Free School Zones Act in *Lopez*. Likewise, the noneconomic nature of the "take" provision should be central to this Court's decision to invalidate the ESA as applied to the Arryo toad. If the statute does not purport to regulate a commercial activity, the courts may not simply cast about for the nearest commercial activity to bring the statute under the purview of the Commerce Clause, as was done in this case. That would allow Congress to regulate under the Commerce Clause without any "logical stopping point." *See Home Builders*, 130 F.3d at 1065 (Sentelle, J., dissenting).

The D.C. Circuit did not find that the toad (the regulated entity) is a commercial species or that the "taking" of the toad (the regulated activity) is itself commercial, rather, the court ignored the *Lopez* factors and found that the fence was part of

the development, a clear commercial enterprise, which justified federal regulation under the Commerce Clause. "[The] regulated activity," the court said, "is Rancho Viejo's planned commercial development, not the arroyo toad that it threatens." *Rancho Viejo v. Norton*, 323 F.3d at 1072.

As Judge Sentelle points out, however,

> even if it were constitutionally sufficient that the take, although not required by the terms of the statute, coincidentally constituted activity in interstate commerce, that does not match the facts of this case. Ground preparation and erection of a fence are not commerce, and certainly not interstate. Even the construction of houses hardly constitutes interstate commerce.

Rancho Viejo, 334 F.3d at 1159-60 (Sentelle, J., dissenting to denial of rehearing en banc).

This decision caps the D.C. Circuit's continuing failure to properly apply the "substantial effects" test established in *Lopez* and *Morrison* and undermines this Court's Commerce Clause jurisprudence. The decision below "leads to the result that regulating the taking of a hapless toad that . . . lives its entire life in California constitutes regulating '[c]ommerce . . . among the several States.'" *Id.* at 1160 (Roberts, J., dissenting to denial of rehearing en banc). This cannot be the law.

II

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THIS CASE IS IN CONFLICT WITH A DECISION OF THE FIFTH CIRCUIT

As instructed in *Lopez*, and explained in *Morrison*, the first and primary factor to be weighed in determining an activity's substantial effect on interstate commerce is whether the statute, by its terms, has anything to do with commerce or

an economic enterprise; that is, does the act purport to regulate an economic activity? *Morrison*, 529 U.S. at 609-10. This Court reaffirmed that interpretation of those cases in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*).

In *SWANCC* the government argued that it had authority pursuant to the Commerce Clause to protect isolated, intrastate waters under the Clean Water Act because migratory birds use those waters and "millions of people spend over a billion dollars annually on recreational pursuits relating to migratory birds" that substantially affect interstate commerce. *Id.* at 173. But this Court was clearly skeptical of that argument noting that it raised "significant constitutional questions." *Id.* "For example," this Court observed, " we would have to evaluate the precise object or activity" that substantially affects interstate commerce. According to this Court, that was unclear because the government had first claimed jurisdiction over petitioner's land "because it contains water areas used as habitat by migratory birds," but now the government was claiming jurisdiction over petitioner's land because it would be used for a landfill which the government argued was "'plainly of a commercial nature.'" *Id.* In response, this Court harkened back to *Lopez* and stated, "But this is a far cry, indeed, from the 'navigable waters' and 'waters of the United States' *to which the statute by its terms extends*." *Id.* (emphasis added).

Although this Court did not decide *SWANCC* on constitutional grounds, this discussion is instructive in two respects. First, it further clarifies the first *Lopez* factor. To identify the "precise object or activity" which may substantially affect interstate commerce, this Court said it must look to the terms of the statute. And second, by directing the inquiry to the terms of the statute, this Court impliedly rejected the notion that there are any number of ways to establish substantial effects to validate a Commerce Clause enactment. It is significant, therefore, that the Fifth Circuit expressly rejected the rationale

of the D.C. Circuit in this case upholding the constitutionality of the ESA as applied to the Arroyo toad.

As Judge Roberts pointed out, the decision below "in effect asks whether the challenged *regulation* substantially affects interstate commerce, rather than whether the *activity* being regulated does so." *Rancho Viejo*, 334 F.3d at 1160 (Roberts, J., dissenting from denial of rehearing en banc). This, of course, is contrary to *Lopez*, as explained by *Morrison*, and now *SWANCC*. In this case, the D.C. Circuit upheld the application of the ESA "because Rancho Viejo's commercial development constitutes interstate commerce and the regulation impinges on that development, not because the incidental taking of arroyo toads can be said to be interstate commerce." *Id.*

The problem with this approach is that had it been applied in *Lopez* and *Morrison*, those cases would have come out differently. That is why the approach was expressly rejected by the Fifth Circuit in *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003). Like *Rancho Viejo*, *GDF Realty* involved a Commerce Clause challenge to federal regulation of intrastate, noncommercial species under the ESA. These species of arachnids and mollusks, or so-called "cave bugs," are even more isolated than the Arroyo toads in this case. They live their entire lives in certain caves in the State of Texas and have rarely been seen. But, as in *Rancho Viejo*, the government claimed the nearby development would result in the "taking" of these elusive species and that the connection to that development provided the requisite "substantial effects" on interstate commerce. And, like the D.C. Circuit in this case, the district court in *GDF Realty* adopted that argument. However, the Fifth Circuit did not.

To the contrary, the court of appeals in *GDF Realty* took the district court to task for looking "primarily beyond the regulated conduct—Cave Species takes—in order to assess effect[s] on interstate commerce." *Id.* at 634. According to the

Fifth Circuit, the district court should not have "looked to the plaintiff's planned commercial development of the property where the takes would occur" because, while the effect of regulating "takes" may prohibit development in some circumstances, Congress "is not directly regulating commercial development" through the ESA. *Id.* Thus, the Fifth Circuit concluded:

> To accept [this analysis] would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors. There would be no limit to Congress' authority to regulate intrastate activities, so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce.
>
> *Id.*

To prove this point, the Fifth Circuit turned to *Lopez* and *Morrison* and observed that regulation of gun possession would have passed muster as applied to a possessor who regularly sold guns while the Violence Against Women Act would have been upheld if the violator had sold videotapes of the violence in interstate markets. But this would have been contrary to those cases, the Fifth Circuit said, because both cases involved a facial attack which requires that there be no circumstances in which the statutes could have been found constitutional. *Id.* at 635.

This is precisely the reason the Fifth Circuit gave for rejecting this approach. As the court explained: "looking primarily beyond the regulated activity in such a manner would 'effectually obliterate' the limiting purpose of the Commerce Clause. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)." *Id.* at 634-35

Judge Sentelle was, therefore, correct in his assessment that a direct conflict exists between the D.C. Circuit and the

Fifth Circuit. Although the Fifth Circuit upheld the ESA in *GDF Realty*, on different grounds, "The Fifth Circuit has explicitly rejected the claim that federal regulation protecting a noncommercial species is permissible if the activity constituting the 'take' was itself economic." *Rancho Viejo*, 334 F.3d at 1159 (Sentelle, J., dissenting from denial of rehearing en banc).

CONCLUSION

This Court has never upheld federal regulation of an intrastate activity, based on that activity's substantial effects on interstate commerce, unless that activity has been economic in nature. To do so would allow Congress unlimited regulatory authority under the Commerce Clause to rival the police powers of the states. But, the D.C. Circuit has given Congress such authority in this case through the ESA. Therefore, to bring that circuit in line with this Court's jurisprudence and to resolve a direct conflict between the D.C. Circuit and the Fifth Circuit, this Court should grant the petition for writ of certiorari and overturn the decision below.

DATED: January, 2004.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 28 2004
OFFICE OF THE CLERK

(17)

No. 03-761

In the Supreme Court of the United States

RANCHO VIEJO, LLC,
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GALE A. NORTON, SECRETARY OF THE INTERIOR, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF OF THE STATES OF TEXAS, ALABAMA, ALASKA, DELAWARE, MICHIGAN, NEBRASKA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does Congress's authority "[t]o regulate Commerce . . . among the several states," U.S. CONST. art. I, §8, cl. 3, permit the application of the Endangered Species Act to purely local activities that might potentially harm the habitat of a wholly intrastate and commercially-irrelevant toad species?

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INTEREST OF *AMICI CURIAE*

The *Amici* States have a long history of protecting wildlife and serving as responsible stewards of our precious natural resources. For that reason, the *Amici* States have a significant interest in maintaining their sovereign control over wildlife regulation and land-use planning within their borders. The court of appeals's decision threatens state control over such decisions and allows Congress to regulate matters of purely state concern without any requirement of a genuine connection to interstate commerce. Moreover, the holding and reasoning of the court of appeals threatens the *Amici* States' ability to develop and administer their own state endangered-species programs.[1] The *Amici* States file this

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1. *See* ALASKA STAT. §§16.20.180–.210; CAL. FISH & GAME CODE §§2050–2115.5; COLO. REV. STAT. §§33-2-101–-108; CONN. GEN. STAT. §§26-303– -316; DEL. CODE tit. 7 §§601–605; FLA. STAT. §§372.072–.074; GA. CODE §§12-6-171– -176, 27-3-130– -133; HAW. REV. STAT. §§195D-2– -31; ILL. COMP. STAT. 10/1–10/11; IND. CODE §§14-22-34-1– -21; IOWA CODE §§481B.1–.9; KAN. STAT. §§32-957– -963, 32-1009– -1012, 32-1033; KY. REV. STAT. §§146.600–.619, 150.183, 150.9990; LA. REV. STAT. §§56:1901– :1907; ME. REV. STAT. tit. 12, §§7751–7759; MD. CODE, NAT. RES. I §§4-2A-01–-09, 10-2A-01–-09; MASS. GEN. LAWS ch. 131A, §§1–6; MICH. COMP. LAWS §§324.36501–.36507; MINN. STAT. §§84.0894–.0895; MINN. R. 6134.0100-0400; MISS. CODE §§49-5-101– -119; MONT. CODE §§87-5-101– -131; NEB. REV. STAT. §§37-801– -811; NEV. REV. STAT. §§244-386–.388, 503.584–.660; N.H. REV. STAT. §§212-A:1– -A:15; N.J. Stat. §§23:2A-1– -14; N.M. STAT. §§17-2-37– -46; N.Y. ENVTL. CONSERV. LAW §11-0535; N.C. GEN. STAT. §§113-331– -337, 106-202.12; OHIO REV. CODE §§1531.24–.26, .99; OR. ADMIN. R. 635-100-0105; OR. REV. STAT. §§496.004, .171, .172–.192, 498.026, 527.610–527.885, 527.992, 564.100–.135; 30 PA. CONS. STAT. §2305; 34 PA. CONS. STAT. §2167; 17 PA. CODE §§45.31–.35; R.I. GEN. LAWS §§20-37-1– -5; S.C. CODE §§50-15-10– -90; S.D. CODIFIED LAWS 34A-8-1– -13; TENN. CODE §§70-8-101– -112; TEX. PARKS & WILD. CODE §§49.015, 68.001– .021; 30 TEX. ADMIN. CODE §330.129; 31 TEX. ADMIN. CODE §§65.171, 69.1; UTAH CODE §§23-13-1– -17; VT. STAT. tit. 10, §§5401–5410; VA. CODE

brief to assert their interest in restoring state control over their resources and returning to the federal-state balance of power secured by the Constitution.

REASONS FOR GRANTING THE WRIT

I. THE ENDANGERED SPECIES ACT IMPERMISSIBLY INTRUDES INTO THE STATES' TRADITIONAL MANAGEMENT OF LAND USE AND PURELY INTRASTATE WILDLIFE, AND IMPEDES THE EFFECTIVE EXERCISE OF THEIR POLICE POWERS.

As the Court has recognized, land use is traditionally an area of state concern. *See, e.g., Solid Waste Agency v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001); *Lake Country Estates v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 402 (1979). Likewise, the conservation and protection of wildlife is also peculiarly within the States' police power, and the States have great latitude in determining the means for that protection.[2] *See Lacoste v. Dep't of Conservation*, 263 U.S. 545, 552 (1924); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1064 (CA DC Cir.1997) (Sentelle, J., dissenting); *see also Hughes v. Oklahoma*, 441 U.S. 332, 337 (1979) (stating that wildlife protection is a legitimate local purpose, similar to the States' interest in protecting the health and safety of their citizens).

Consistent with this tradition, forty States have independent regulatory schemes governing endangered species. *See supra*

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§§29.1-563--570; WASH. REV. CODE §§77.12.020, 77.08.010, 77.15.055, 79.17.040; WIS. STAT. §29.604; *see also* MO. REV. STAT. §252.240; OKLA. STAT. tit. 29, §§5-412, 412.1, 7-206, 7-502--504, 7-601--602.

2. Other areas of traditional state concern include education, criminal law enforcement, and family law. *United States v. Morrison*, 529 U.S. 598, 615-16 (2000); *United States v. Lopez*, 514 U.S. 549, 564 (1995); *id.*, at 580 (Kennedy, J., concurring).

note 1. Several States go even farther, protecting "threatened" species as well. *See, e.g.*, 31 TEX. ADMIN. CODE §§65.171-.184, 69.01-.14; MASS. GEN. LAWS Ch. 131A, §§1-6. Any fear that, without the ESA's application to all intrastate species, endangered species would somehow go unprotected is dispelled by these many state programs. By displacing the state policy choices expressed by state laws protecting endangered species, however, the ESA renders the States' statutes and regulations largely irrelevant and discourages the further development of state regulatory schemes. The States should be allowed, and encouraged, to continue "perform[ing] their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Lopez*, 514 U.S., at 581 (Kennedy, J., concurring).

Not only does the ESA improperly displace the States' efforts to manage wildlife that is unrelated to interstate commerce, the ESA hinders the States in the execution of their police powers as well as their established authority to regulate land use. For example, the ESA has impeded local efforts in several States to clear trees and brush in order to prevent forest fires. *See, e.g.*, Wes Smalling, *Forests, Fire and Fate*, THE SANTA FE NEW MEXICAN, Aug. 10, 2003, at A1; Ben Goad & Jennifer Bowles, *Fire Official Faults Agency//Habitat; Fish and Wildlife Lets Growth Fears Delay Needed Burns, an Inland CDF Chief Says*, THE PRESS-ENTERPRISE, Dec. 16, 2003, at A01 (discussing arroyo toad); Jia-Rui Chong, *California; Federal Agency Faulted in Fires; San Bernadino Officials Say the Fish and Wildlife Service Held Up Crucial Controlled Burns*, LOS ANGELES TIMES, Dec. 15, 2003, at B1. The ESA's prevention or lengthy delay of clearing projects potentially caused, or at least contributed to, the catastrophic fires that occurred in Southern California last year. *See Smalling, supra*; Goad & Bowles, *supra*; Chong, *supra*. In addition to threatening human lives, property, and land, these fires can have potentially devastating collateral effects, such as destruction of critical water supplies. *See*

Smalling, *supra*. Protecting state citizens and their property, as well as safeguarding state forests and water supplies, are undeniably legitimate exercises of States' traditional police powers and should not be constrained by federal regulation of species with no connection to interstate commerce.

In addition to inhibiting the States by extending to species that are outside of Congress's scope of authority, the ESA's take provision also imposes remedies where they already exist. The States have developed protective measures and remedies, *see supra* note 1, and the take provision's needless overlap with some of those requirements, together with its overriding of several others, make it as unnecessary as it is improper when applied to intrastate, non-commercial species. Moreover, the friction between the policy choices of unelected federal officials and state legislatures over the appropriate designation and management of endangered species, as well as the proper sanctions for conduct adversely affecting such a species, only underscores the sensitivity of the issue and the constitutional issues at stake.

The court of appeals's decision validates a federalization of the control of land development through the ESA's take provision. And it ignores the fact that federal control of state resources conflicts with the States' historical independence in carrying out their domestic policy. Forty States have their own endangered species programs, and they must know the limits of Congress's reach in order to plan and administer their programs. Given our Constitution's concern with comity and limited federal power, the Court should grant the petition and review the take provision's impact on the federal-state balance.

II. THE CONFLICT BETWEEN THE D.C. CIRCUIT AND THE FIFTH CIRCUIT'S ANALYSIS OF CONGRESS'S COMMERCE-CLAUSE AUTHORITY PREVENTS THE STATES FROM ASCERTAINING THE REACH OF THE ESA, AND CONFUSES ACCEPTED COMMERCE-CLAUSE ANALYSIS.

Although both ultimately upheld the constitutionality of the ESA, the D.C. Circuit and the Fifth Circuit are divided in their rationales and approach for sustaining the ESA take provision as it applies to non-commercial, intrastate species. The result is that one circuit's commerce-clause analysis permits applications of the take provision that would not be countenanced in the other circuit. That conflict requires resolution by the Court.

A. The Fifth Circuit Expressly Rejected the D.C. Circuit's Adoption of Commerce-Clause Analysis That Turns on the Character of the Actor Affected by the Federal Regulation.

The Fifth Circuit explicitly rejected the brand of commerce-clause analysis adopted by the D.C. Circuit, which measures the reach of Congress's authority by the character of the affected party. Maintaining the commerce-clause analytical inquiry in its proper place, the Fifth Circuit instead assessed the regulated activity, as opposed to the character of the regulated actor. *See GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 634-35 (CA5 2003) (explaining that "looking primarily beyond the regulated activity . . . would 'effectually obliterate' the limiting purpose of the Commerce Clause," and that under such an approach, "the facial challenges in *Lopez* and *Morrison* would have failed"). In contrast, the D.C. Circuit decided to assessed the *effects* of the challenged regulation on interstate commerce rather than "the *activity* being regulated." *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (CA DC 2003) (Roberts, J., dissenting from denial of rehearing en banc).

As the Fifth Circuit explained, the D.C. Circuit's erroneous approach fails to identify the limits of Congress's authority, and instead assesses the affected party's connection to interstate commerce, requiring only that affected parties exhibit general commercial indicia:

> "To accept [such] analysis would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors. There would be no limit to Congress' authority to regulate interstate activities so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce." *GDF Realty*, 326 F.3d, at 634-35.

In the Fifth Circuit, the fact that GDF Realty was engaged in economic activity—commercial real estate development—was simply immaterial. The Fifth Circuit explained that consideration of GDF Realty's "commercial motivations that would underlie the takes" would improperly extend "the scope of this relevant conduct beyond . . . takes." *Id.*, at 633. Unlike the D.C. Circuit, the Fifth Circuit concluded that the proper scope of inquiry is "whether the expressly regulated activity substantially affects interstate commerce, *i.e.*, whether takes . . . have the substantial effect." *Id.* (emphasis omitted).

Thus, the two circuits fundamentally disagree about what a court is to analyze when it looks for the necessary substantial effects on interstate commerce. In one circuit, a court should consider the front-end subject matter of the statute, not the back-end secondary effects of the statute as applied to the facts of a particular case; and in other circuit, the opposite is true. In this case, depending on the circuit, the proper inquiry is either whether a take of an arroyo toad substantially affects interstate commerce, or whether the ultimate hindrance of commercial development of a property (in the name of preventing a take) substantially affects interstate commerce.

By ignoring the actual subject matter of the statute, the D.C. Circuit's analysis leads to inconsistent results depending on nature of the actor. Implicit in its conclusion that the regulated activity was real estate development, *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1069 (CA DC 2003), is a recognition that a take by a non-commercial actor would not substantially affect interstate commerce. If a landowner wanted to eliminate arroyo toads for sport, for religious reasons, for aesthetic preference, or for simple whimsy, the court of appeals's analysis would not support the application of the take provision. That inconsistency undermines the D.C. Circuit's analysis altogether; the constitutionality of the take provision should not turn on the happenstance of the taker's intent or character, nor should it turn on geographic fortuity.

Moreover, the self-justifying nature of the D.C. Circuit's analysis encourages broad, non-specific, and intrusive enactments. No matter what the subject matter, the greater the potential impact of a statute, even if completely unintended, the more likely it is to be upheld on commerce-clause grounds. The capricious results of the D.C. Circuit's analysis, together with its conflict with the Fifth Circuit regarding the proper object of commerce-clause analysis, warrant the Court's examination.

B. The Disagreement Between the D.C. Circuit and the Fifth Circuit About Aggregation of Non-Economic Activities Leaves Commerce-Clause Analysis in Confusion.

In *GDF Realty*, the Fifth Circuit correctly concluded that for any aggregation, "the intrastate instance of activity be commercial." 326 F.3d, at 638. In contrast, the D.C. Circuit rejected the contention that non-economic taking activity [must] could not be aggregated, *Rancho Viejo*, 323 F.3d, at 1071-72 & n.10; *see also Terry v. Reno*, 101 F.3d 1412, 1417 (CA DC 1996) ("The regulated activity . . . need not be commercial, so long as its effect on

interstate commerce is substantial."). The Fifth Circuit explained that if aggregation is utilized to sweep in "any imaginable activity," then it would be preordained that aggregated non-economic activities could in domino effect "reduce national economic productivity," leaving Congress's commerce-clause power without limit. *GDF Realty*, 326 F.3d, at 629. Such reasoning would turn the Commerce Clause "into what it most certainly is not, a general police power." *Id.* (emphasis omitted).

The disagreement between the two circuits regarding proper aggregation injects yet more confusion into the state of commerce-clause analysis, precluding any predictable analysis for the States and providing further reason for the Court's review.

C. The Fifth Circuit's Rationale Was Also Flawed and Its Analysis Was Inconsistent with the Approach of the D.C. Circuit.

The Fifth Circuit ultimately sustained the application of the take provision to intrastate, non-commercial species because it viewed the ESA as a whole as "an economic regulatory scheme," *id.*, at 640, and decided that takes of an intrastate, non-commercial species could be aggregated with other takes because, in its view, the regulation of any species is an essential part of the larger regulatory scheme, *id.*, at 638-39, 640. In so concluding, the Fifth Circuit accepted a premise advanced by the Fish and Wildlife Service—a premise that was not relied upon by the D.C. Circuit—that takes of *any* species necessarily threaten the "interdependent web" of all species. *See id.*, at 640. Through this "interdependent web" conjecture, the Fifth Circuit collapsed activities related to commercial and interstate species with the admittedly non-commercial, Texas cave species at issue in *GDF Realty*.

The D.C. Circuit did not rely on the interdependent web theory; instead, it relied upon the commercial nature of the affected actor. This incongruity provides further reason for the Court's review.

III. THE D.C. CIRCUIT'S INCONSISTENCY WITH THIS COURT'S COMMERCE-CLAUSE PRECEDENT WARRANTS REVIEW.

Both circuits' rationales are not only at odds with each other, but they are inconsistent with this Court's commerce-clause precedent and the Court's insistence on a meaningful distinction between that which is national and that which is truly local.

The Court has construed the Commerce Clause to permit Congress to regulate three areas of commercial activity: (1) the use of the channels of interstate commerce; (2) the instrumentalities of, or persons or things in, interstate commerce; and (3) other activities that "substantially affect" interstate commerce. *Lopez*, 514 U.S., at 557-59. It is common ground that the take provision does not come within the first two commerce-clause safe harbors. With regard to the last category, the key inquiry is whether the regulated activity "substantially affects" interstate commerce, 514 U.S., at 557 n.2, 562, or whether the relationship between the regulated activity and interstate commerce is too attenuated to be regarded as substantial, *id.*, at 563-67, that is, whether the rationale "would . . . convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States," *id.*, at 567. The court of appeals's decision runs afoul of the Court's mandate that substantial effects must be understood to impose meaningful limits on congressional power under the Commerce Clause.

A. The D.C. Circuit's Approval of Congressional Regulation of Non-Economic Intrastate Activity Is at Odds with the Court's Insistence on Economic Activity.

The take provision's purpose is wildlife preservation, not economic regulation. *See, e.g., Wyo. Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1237 (CA10 2000). And there is no dispute that there is no national market for arroyo toads, nor any evidence suggesting that the toads are the subject of any

commercial activity. *See Rancho Viejo*, 323 F.3d, at 1072. Nevertheless, because the affected party was commercial, the D.C. Circuit authorized the application of the take provision to the intrastate toad.

The D.C. Circuit's endorsement of congressional regulation of local activities affecting species lacking commercial effects stands conspicuously apart from the Court's decisions linking commerce-clause authority to economic activity. In *Lopez* and *Morrison*, the Court recognized that the Commerce Clause does not extend to non-commercial intrastate activity. *Morrison*, 529 U.S., at 611, 613 ("Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."); *Lopez*, 514 U.S., at 559-61 (explaining that Gun-Free School Zones Act had nothing to do with "commerce" or any sort of economic enterprise); *id.*, at 580 (Kennedy, J., concurring) (observing that neither the actors nor their conduct had commercial character, nor did the statute evidence a commercial nexus). Moreover, the Court's review of commerce-clause decisions in *Morrison* and *Lopez* demonstrates that when the Court has sustained federal regulation of intrastate activity based on the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor. *Morrison*, 529 U.S., at 611; *Lopez*, 514 U.S., at 559-60. The necessity of economic activity is confirmed by *Morrison*'s express rejection of the claim that Congress could regulate non-economic conduct based solely on that conduct's aggregate effect on interstate commerce. 529 U.S., at 617. While one can always identify commercial effects of non-economic regulation, as the losing parties had done in both *Lopez* and *Morrison*, the Court made clear that intrastate activity must be economic to be regulated. *Id.*, at 610-11 (citing *Lopez*, 514 U.S., at 559).

Nothing about the application of the take provision in this case suggests any economic or commercial activity. Even under the most indulgent view, application of the take provision to non-

commercial, intrastate species has far fewer commercial qualities than the guns-around-schools legislation invalidated in *Lopez*. *See Lopez*, 514 U.S., at 567 ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."). And the provision does not approach such economic activities as intrastate coal mining, *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), intrastate extortionate credit transactions, *Perez v. United States*, 402 U.S. 146 (1971), inns and hotels catering to interstate guests, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), restaurants using substantial interstate supplies, *Katzenbach v. McClung*, 379 U.S. 294 (1964), or even—with the reach of the Commerce Clause at its apogee—the production and consumption of homegrown wheat, *Wickard v. Filburn*, 317 U.S. 111 (1942).

The commercial nature of these activities simply finds no parallel in the application of the take provision to the intrastate arroyo toad. As in *Lopez*, the application of the take provision "has nothing to do with 'commerce' or any sort of economic enterprise." 514 U.S., at 561. The take provision applied to an intrastate species without commercial effect simply does not "substantially affect" interstate commerce, at least if this limit on congressional authority is to remain meaningful.

B. The D.C. Circuit's Focus on the After-Effects of a Regulation Contradicts the Court's Focus on Regulated Activities.

The court of appeals's effects-based analysis largely ignores Congress's actual intentions and, consequently, is foreign to the four-part review required by *Morrison*. *See* 529 U.S., at 609-12. By looking for a jurisdictional element and reviewing congressional findings regarding the regulated activity's effect on interstate commerce, the *Morrison* formulation leaves no doubt that the

proper focus of commerce-clause analysis is the direct subject of the statute (*i.e.*, taking of intrastate non-commercial species), rather than some unspecified effect that is only later discovered and is dependent on the specific actor in question. Indeed, in *Solid Waste Agency*, the Court noted that aggregation based on the nature of the actor, rather than on the activity that was the object of the regulation, "would raise significant constitutional questions." 531 U.S., at 173-74. Contradicting the Court's focus on the activity "to which the statute by its terms extends," *id.*, the D.C. Circuit limited itself to the nature of the affected party and his activity, holding that the "precise activity" to be considered was the planned commercial development, *Rancho Viejo*, 323 F.3d, at 1072. This inconsistency with the Court's decisions provides yet another reason for the Court's review.

C. The Court of Appeals's Decision Weakens the Court's Prohibition Against Attenuation to the Point of Non-Existence.

The court of appeals's approval of an extremely attenuated connection to interstate commerce effectively eliminates the distinction between what is national and what is local. The court of appeals engaged in the very same kind of attenuated reasoning to justify congressional regulation of intrastate activities that the Court rejected in *Lopez* and *Morrison*. *See Morrison*, 529 U.S., at 612; *Lopez*, 514 U.S., at 567.

The court of appeals's reasoning makes a plausible case for the position that activities of one intrastate species, might like a rock thrown into a pond, have effects that could lead to other effects that would potentially affect interstate commerce. But that argument proves too much; such reasoning would allow Congress to regulate any intrastate activity, including areas of traditional state regulation, such as education, crime, and family law. *See Morrison*, 529 U.S., at 615-16; *cf.*, *Lopez*, 514 U.S., at 564. *Lopez* and *Morrison* both

rejected this rationale as inconsistent with the doctrine of enumerated federal powers. *Morrison*, 529 U.S., at 616-18; *Lopez*, 514 U.S., at 567-68. Like the regulation of intrastate violence invalidated in *Morrison*, the regulation of intrastate species that is not directed at the instrumentalities, channels, or goods involved in intrastate commerce "has always been the province of the states." 529 U.S., at 618. The activities at issue are inherently local in nature, and involve precisely the kinds of policy choices that State governments have historically been responsible for making.

The rationale offered by the court of appeals for meeting the "substantial effects" test also fails to circumvent the same pitfall that doomed the law at issue in *Lopez*. In *Lopez*, the rationales offered to sustain the law each violated the bedrock principle animating the Court's commerce-clause cases—that is, whatever the explanation for the exercise of power, it cannot convert a commerce power of limited reach into one of unbounded breadth. 514 U.S., at 563-68. The government, for example, argued that firearms possession in a school zone could result in violent crime, which in turn could create substantial insurance costs throughout the country or create disincentives to travel to parts of the country that appeared to be unsafe. *Id.*, at 563-64. It also argued that firearms possession in a school zone could threaten the learning environment, which in turn could result in a less productive citizenry. *Id.*, at 564. The problem, the Court concluded, was that it was "hard pressed to posit any activity by an individual that Congress is without power to regulate" under these explanations. *Id.* The D.C. Circuit's reasoning similarly lacks a stopping point.

The D.C. Circuit's attenuated connection to interstate commerce abandoned the Court's view that "the Constitution's enumeration of powers . . . presuppose [s] something not enumerated" and in the process abandoned the "distinction between what is truly national and what is truly local." *Id.*, at 567-68. As the Court reaffirmed in *Lopez* and *Morrison*, the powers delegated to the federal

government are few and defined, while those that remain in the state governments are numerous and indefinite. *Morrison*, 529 U.S., at 618 & n.8; *Lopez*, 514 U.S., at 552 (citing THE FEDERALIST No. 45, at 292-93 (James Madison) (Clinton Rossiter ed. 1961)). The D.C. Circuit's reasoning turns this balance on its head by granting the federal government essentially a broad police power over endangered species, regardless of their connection to interstate commerce.[3]

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3. This conflict is clear today and is unlikely to sharpen or develop any further with the passage of time. *See Rancho Viejo*, 334 F.3d, at 1160 (Sentelle, J., dissenting from denial of rehearing en banc) ("This decision of the court continues a line of cases in conflict with Supreme Court jurisprudence . . .".). Nor can it be resolved without the Court's review. Indeed, the court of appeals's decision is emblematic of the confusion in the lower courts regarding Congress's commerce-clause authority. *See, e.g., Raich v. Ashcroft*, 352 F.3d 1222 (CA9 2003) (enjoining as likely beyond Congress's commerce-clause authority, extension of Controlled Substances Act, 21 U.S.C. §801, to intrastate, non-commercial cultivation and possession of cannabis for personal medical purposes); *United States v. Laton*, 352 F.3d 286 (CA6 2003) (rejecting, over Judge Sutton's dissent, commerce-clause challenge to federal arson statute applied to local fire station burned by local official); *United States v. Darrington*, 351 F.3d 632 (CA5 2003) (rejecting commerce-clause challenge to the felon-in-possession statute, 18 U.S.C. §922(g)(1)); *United States v. McFarland*, 311 F.3d 376 (CA5 2002) (*en banc*) (affirming conviction by reason of an equally divided court on the issue whether Congress has commerce-clause authority to extend the Hobbs Act to robberies of local retail stores). Moreover, because a decision by the D.C. Circuit on the proper scope of a federal regulation stands as substantial and unavoidable precedent in any circuit, it should not be left unreviewed.

D. In the Interests of Preservation of Our Dual Sovereignty and Federalism's Role as One of the Counter-Majoritarian Guarantees That Preserve Liberty, the Court Should Grant the Petition.

The division of authority in our federal system is not merely an empty distinction of a bygone era. *See Lopez*, 514 U.S., at 552. Rather, it continues to have force as a means of "secur[ing] to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, 181 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)). Far from protecting state sovereignty for its own sake, the goal of federalism is to maintain the freedoms that only divided and dispersed government can provide. As the Court has recognized, "a healthy balance of power between the State and the Federal Government will reduce the risk of tyranny and abuse from either front. . . . In the tension between federal and state power lies the promise of liberty." *Gregory v. Ashcroft*, 501 U.S., 452, 458-59 (1991).

No matter how virtuous the public policy objectives—making society safe for law-abiding citizens, rooting out gender-motivated violence, or even protecting our natural resources—there are necessarily constitutional limitations. *Cf. Morrison*, 529 U.S. 598; *Lopez*, 514 U.S. 549. The Court's history is one of safeguarding structural and individual-rights guarantees of liberty against the exigencies of the moment. Just as the Court has not hesitated to consider issues of individual-liberty rights against society's need for collective security, nor hesitated to ensure an appropriate separation of powers among the national branches of government, it should likewise act to protect the foundational principle that Congress has limited and enumerated powers. The objective of the Framers after all was to "split the atom of sovereignty." *Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)). Because

federalism is a [illegible]aining principle of our Republic, and the court of appeals's decision misapprehends the dividing line between the Congress and the sovereign states, the Court should grant the petition.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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January 2004

FILED
JAN 23 2004
OFFICE OF THE CLERK

(9)

No. 03-761

IN THE

Supreme Court of the United States

RANCHO VIEJO, LLC,

Petitioner,

v.

GALE A. NORTON, Secretary of the Interior, *et al.*

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

AMICUS CURIAE BRIEF OF GDF REALTY INVESTMENTS, LTD., PARKE PROPERTIES I, L.P., AND PARKE PROPERTIES II, L.P.

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AMICUS CURIAE BRIEF OF GDF REALTY INVESTMENTS, LTD., PARKE PROPERTIES I, L.P., AND PARKE PROPERTIES II, L.P.

I. INTEREST OF THE *AMICI CURIAE*

Amici Curiae GDF Realty Investments, Ltd., Parke Properties I, L.P., and Parke Properties II, L.P. (collectively referred to as "GDF" or "Amici")[1] respectfully submit this amici curiae brief in support of Petitioner Rancho Viejo,

[1] Consent to file this brief was requested and granted by counsel for Petitioner, Rancho Viejo, LLC, and by counsel for Gale A. Norton. Counsel for a party did not author this brief in whole or in part. The American Land Foundation, a 501(c)(3) non-profit foundation, made a monetary contribution to the preparation and submission of this brief.

LLC. As amply set forth in Rancho Viejo's Petition for Writ of Certiorari, the Circuit Court decision below conflicts with this Court's landmark Commerce Clause[2] decisions in *U.S. v. Lopez*, 514 U.S. 549 (1995), and *U.S. v. Morrison*, 529 U.S. 598 (2000), and thereby improperly upholds Congress' authority to regulate takes of the arroyo toad under § 9(a)(1)(b) of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531, *et seq.* — a purely intrastate, non-commercial activity that has no discernable effect upon interstate commerce and is not part of a scheme of commercial regulation.

GDF's interest in this case stems from its litigation of very similar issues currently pending on rehearing in the Fifth Circuit Court of Appeals. *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003). GDF's case involves a Commerce Clause challenge to the application of the ESA take provision to several species of wholly intrastate, non-commercial cave-dwelling insects. *Id.* at 625. The D.C. Circuit's reasoning in *Rancho Viejo* conflicts with the Fifth Circuit's reasoning in *GDF Realty* and, in so doing, improperly expands the government's Commerce Clause authority at the expense of private landowners, while intruding on the traditional land use authority of state and local governments.

II. SUMMARY OF ARGUMENT

The Fifth Circuit and the D.C. Circuit offer plainly conflicting rationales for analyzing the crucial question in Commerce Clause "substantial effects" cases — what activity or conduct "counts" for the purposes of determining whether a regulation substantially affects interstate commerce. The Fifth Circuit holds that the inquiry must be limited to activities regulated by the express terms of the

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[2] U.S. CONST. ART. I, § 8, cl. 3.

statute. *GDF Realty*, 326 F.3d at 633-36. In the case before this Court, the D.C. Circuit held to the contrary, expanding the substantial effects inquiry to activities and motivations outside the express terms of the challenged regulation. *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1072-73 (D.C. Cir. 2003). Thus, although *GDF Realty* and *Rancho Viejo* involved essentially the same Commerce Clause challenges (application of the Endangered Species Act take provision to intrastate, non-commercial species), they reach different results on whether takes of those species substantially affect interstate commerce.

Because this element of Commerce Clause analysis is almost always case-dispositive, this Court should grant certiorari and resolve the split by affirming that only conduct regulated by the express terms of the challenged provision may be used for determining "substantial effect."

III. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT IN COMMERCE CLAUSE REASONING BETWEEN THE D.C. CIRCUIT IN *RANCHO VIEJO* AND THE FIFTH CIRCUIT IN *GDF REALTY*.

The D.C. Circuit's analysis of the limits of Congress' Commerce Clause authority in *Rancho Viejo* squarely conflicts with the Fifth Circuit's analysis of those same limits in *GDF Realty*. Because the Commerce Clause analysis in both cases involves application of the take provision of the Endangered Species Act to wholly intrastate, non-commercial species, and those respective courts apply this Court's landmark decisions in *U.S. v. Lopez* and *U.S. v. Morrison* in a vastly different manner, this Court should grant certiorari to resolve the split in reasoning and take the opportunity to bring order to the lower courts' Commerce Clause jurisprudence that has become confused, at best, and in seeming disregard of *Lopez* and *Morrison* at times.

A. FACTUAL AND PROCEDURAL BACKGROUND IN *GDF REALTY V. NORTON.*

Amici GDF et al. are the owners of approximately 216 acres of undeveloped land in Travis County, Texas, outside the City of Austin. *GDF Realty*, 326 F.3d at 624. Six species of cave-dwelling invertebrates — found only within a few caves and sinkholes on GDF's property and a few other nearby caves — are listed as "endangered" under the federal Endangered Species Act. *Id.* at 625. These six insect species (the "Cave Insects")[3] are small, eyeless creatures that live their entire lives underground in caves and sinkholes, have no commercial value and have never been bought, sold or traded in commerce in any form or fashion. *Id.*

Despite the entirely non-commercial, intrastate nature of the Cave Insects, the United States Fish and Wildlife Service ("FWS") has consistently asserted federal regulatory jurisdiction over GDF's property. *Id.* at 625-26. FWS asserts that GDF's proposed development plans will "take" the Cave Insects in violation of § 9(a)(1)(B) of the ESA. *Id.* In 1990, complying with FWS' requirements in effect at the time, GDF permanently dedicated over 10 acres of prime commercial real estate to a non-profit foundation as preserves for the Cave Insects. *Id.* at 625.

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[3] The six Cave Insects are: (1) Bee Creek Cave Harvestman; (2) Bone Cave Harvestman; (3) Tooth Cave Pseudoscorpion; (4) Tooth Cave Spider; (5) Tooth Cave Ground Beetle; and (6) Kretschmarr Cave Mold Beetle. The final rule listing five of the six the Cave Insect as "endangered" pursuant to § 4 of the ESA was adopted on September 16, 1988. 53 Fed. Reg. 36029. Previously considered to be the same as the Bee Creek Cave Harvestman, the sixth Cave Insect — the Bone Cave Harvestman — was listed as a separate "endangered" species on August 18, 1993. 58 Fed. Reg. 43818-01.

Since GDF's dedication of the Cave Insect preserves over a decade ago, FWS has repeatedly changed the rules for protecting the Cave Insects, made increasingly onerous demands for "dedication" of additional preserves, declared substantially all of the 216 acre property as "non-development area," blocked numerous development opportunities, and purposefully refused to act on GDF's §10(a) "incidental take" permit applications — a refusal to act that District Judge Sam Sparks characterized as "totally irresponsibl[e]" and "simply wrong." *GDF Realty Ltd. v. Norton*, 169 F. Supp.2d 648, 652 (W.D. Tex. 2001).

After years of futile attempts to comply with FWS' shifting, inconsistent and ever-increasing demands, GDF filed suit challenging the FWS' authority to regulate take of the Cave Insects on the GDF property. GDF filed suit against Defendants Bruce Babbitt, Secretary of the U.S. Department of the Interior and Jamie Rappaport Clark, Director, United States Fish and Wildlife Service ("collectively referred to as the "Government").[4] The parties submitted the case to the court on cross motions for summary judgment.

On August 30, 2001, District Judge Sam Sparks entered an Order and Judgment granting the Government's Motion for Summary Judgment and denying the GDF's Motion for Summary Judgment and rendered Judgment for the Government. *GDF Realty*, 169 F. Supp. 2d at 664. The District Court's Order held that the ESA take provision is a valid Congressional regulation under the "substantial effect on interstate commerce" category of Congressional authority. *Id.* at 657-663.

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[4] Gale Norton and Steven Williams, in their respective capacities as Secretary of the Interior and Director of the Fish and Wildlife Service, have been automatically substituted as parties in their official capacities. *See*, FED. R. CIV. P. 25(d)(1).

B. THE FIFTH CIRCUIT'S OPINION IN *GDF REALTY*.

GDF timely appealed to the Fifth Circuit Court of Appeals. On March 26, 2003, a panel of the Fifth Circuit Court of Appeals, consisting of Judges Davis, Barksdale and Dennis, rendered an opinion sustaining the constitutionality of the take provision, with Judge Barksdale writing the Panel's opinion. *GDF Realty*, 326 F.3d 622.

The Fifth Circuit panel opinion is noteworthy in several respects because of its rejection of the District Court's reasoning as well as that of the D.C. Circuit. First and foremost, in framing the inquiry for Category 3 "substantial effects" Commerce Clause cases, the Fifth Circuit expressly rejected the District Court's misdirected focus on the proposed use of GDF's property,[5] instead holding that the inquiry must focus on the express terms of the regulated activity — Cave Insect takes — rather than non-regulated conduct such as proposed commercial development. *Id.* at 634-36. The District Court reasoning rejected by the Fifth Circuit mirrors that of the D.C. Circuit in *Rancho Viejo*. Moreover, the Fifth Circuit explicitly stated its disagreement with the D.C. Circuit's reasoning in *National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998). *GDF Realty*, 326 F.3d 622, 635-36. This clear split in reasoning between the Circuits is the primary focus of this brief.

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[5] Instead of addressing the effect of Cave Insect takes on interstate commerce, the District Court looked to GDF's proposed use of the property to locate a nexus with interstate commerce. For example, the District Court stated: "[I]t is obvious that the effect of building Wal-Marts and apartment complexes, in the aggregate, quite substantially affects interstate commerce." GBF Realty, 169 F. Supp.2d at 660 .

In addition to rejecting the property's use (or, similarly, the actor's conduct) as a basis for Commerce Clause jurisdiction, the Fifth Circuit also rejected various other arguments advanced by the Government and adopted, in varying degrees, by other courts. For example, the Fifth Circuit rejected the Government's evidence of scientific travel and publication as showing only a negligible and attenuated effect on interstate commerce. *Id.* at 637. The Fifth Circuit also rejected speculative future commercial benefits that might result from the Cave Insects as a means of showing substantial effect on interstate commerce. *Id.* at 637-38. The Court found that the mere possibility of such future benefits was too hypothetical and attenuated from the regulation in question to pass constitutional muster. *Id.*

After holding that Cave Insect takes alone do not substantially affect interstate commerce, the Fifth Circuit panel upheld Commerce Clause authority by aggregating the effect of *all takes* of *all endangered species*. *Id.* at 640. In other words, even though the Court rejected Cave Insect takes *alone* as a basis for federal jurisdiction, the Court then held that the aggregate effect of *all endangered species takes* could be used to justify regulating Cave Insect takes. *Id.* at 640. The Court reasoned that aggregation is appropriate because the "ESA's take provision is economic in nature" and, as a whole, the "ESA is an economic regulatory scheme; the regulation of intrastate takes of the Cave [Insects] is an essential part of it." *Id.*

In reaching this conclusion, the Fifth Circuit mischaracterized the take provision and the ESA as "economic" when, in fact, both the specific statutory provision and the statute in general are not regulations of a commercial activity or market — they regulate harm to listed species of wildlife. The Fifth Circuit panel's reliance on aggregation of all endangered species to sustain the take provision's application to the Cave Insects is the subject of a

Petition for Rehearing En Banc because it conflicts with this Court's opinions in *U.S. v. Lopez*, 514 U.S. 549 (1995) and *U.S. v. Morrison*, 529 U.S. 598 (2000). That En Banc Petition has been pending since May of 2003.[6]

C. THE CONTRADICTORY RATIONALES EMPLOYED BY THE FIFTH CIRCUIT IN *GDF REALTY* AND THE D.C. CIRCUIT IN *RANCHO VIEJO*.

The D.C. Circuit's opinion in *Rancho Viejo* squarely conflicts with the Fifth Circuit's opinion in *GDF Realty* on the issue that has vexed lower courts' analysis of Commerce Clause authority. The issue is this: what activity or conduct is the proper focus of the "substantial effects" Commerce Clause inquiry? Is the relevant activity or conduct that which is *expressly regulated* by terms of the statutory provision at issue? *See, e.g., GDF Realty*, 326 F.3d at 633-36. Or, can a court look to activity or conduct outside that which is expressly regulated by the challenged provision? *See, e.g., Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1072-73 (D.C. Cir. 2003).

The importance of the proper scope of this inquiry cannot be overstated — it is almost always case dispositive. If the

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[6] A Petition for Panel Rehearing based on a factual error is pending as well. The Panel premised its aggregation decision on an incorrect factual assumption regarding species interdependence. *GDF Realty*, 326 F.3d at 639-40. The Court stated that failure to regulate Cave Insect takes would allow the ESA regulatory scheme to be undercut because of the interdependence of species. *Id.* The Court's presumption of species interdependence is factually incorrect with regard to the Cave Insects. The Cave Insects exist in complete isolation. Cave Insect takes do not make it more (or less) likely that other endangered species takes will occur (or vice versa).

inquiry is broad — i.e., if a court can look beyond the activity or conduct regulated by the express terms of the provision at issue — it is plainly easier to establish a nexus with a "commercial" or "economic" activity, satisfying the first of the four considerations identified by this Court in *Morrison*, 529 U.S at 610-11. Establishing an activity's "commercial" or "economic" nature, in turn, allows for either a finding that the regulated activity substantially affects interstate commerce directly, or allows for a court to apply the aggregation principle first announced in *Wickard v. Filburn*, 317 U.S. 111 (1942). As *Wickard* demonstrates, once aggregation is allowed, regulation of even the most trivial of activities — such as consumption of home-grown wheat — can be sustained under Commerce Clause authority. *Id.* at 128-29.

Conversely, if the "substantial effects" inquiry is tied to the activity or conduct regulated by the express terms of a challenged provision, accurately describing such regulation as "commercial" or "economic" in nature may be impossible. If a challenged provision cannot be described as "commercial" or "economic" in nature, this Court's decisions suggest that aggregation is not available to demonstrate substantial effects on interstate commerce. *Morrison*, 529 U.S. at 613 ("[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.") It is on this fundamental issue that the Fifth and D.C. Circuits employed mutually exclusive rationales.

In *GDF Realty,* the Fifth Circuit held that an actor's conduct that is not the focus of the statute in question cannot be used to supply the nexus with interstate commerce. *GDF Realty*, 326 F.3d at 636. The District Court's decision below is the starting point for setting forth the Fifth Circuit's reasoning on this issue. *GDF Realty*, 169 F. Supp. 2d 648. The District Court upheld the ESA take provision by

focusing primarily on the proposed commercial development on the property which included the construction of a Wal-Mart on part of the property. *Id.* at 660-61.

The District Court's legal analysis in this regard is well illustrated with a few excerpts from the opinion: "Plaintiffs mistakenly focus only on the commercial aspects (or, in their view, the complete lack thereof) of the Cave Species. However, the regulated activity in this case is not simply the Cave Species. It is an alleged take of the Cave Species through plaintiffs' development of the Property. Plaintiffs cannot simply ignore the commercial nature of their activity." *Id.* at 658. In the same vein, the District Court stated, "it is obvious that the effect of building Wal-Marts and apartment complexes, in the aggregate, quite substantially affects interstate commerce." *Id.* at 660. In summary, the District Court found itself "hard-pressed to find a more direct link to interstate commerce than a Wal-Mart." *Id.* at 663.

On appeal, GDF argued that the District Court's analysis was flawed because the challenged regulation — the ESA take provision — does not regulate commercial development, such as the development of Wal-Marts and apartment complexes — it regulates takes of endangered species. The Fifth Circuit agreed, stating:

> Again, we must resolve the question of which activities are to be primarily considered in order to determine substantial effect *vel non*. Each of the three *Lopez* categories recognizes Congress' power to regulate where the *object of regulation* relates to interstate commerce: channels, instrumentalities, or activities. Neither the plain language of the Commerce Clause, nor judicial decisions construing it, suggest that, concerning

substantial effect *vel non,* Congress may regulate activity (here, Cave Species takes) solely because non-regulated conduct (here, commercial development) by the actor engaged in the regulated activity will have some connection to interstate commerce.

In expanding its scope-inquiry to plaintiffs' commercial motivations, the district court relied on *Groome,* which evaluated Congress' Commerce Clause power to regulate under the Fair Housing Act, 42 U.S.C. § 3604(f)(3)(B). *Groome* stated that, in *Lopez* and *Morrison,* 'neither the 'actors' nor the 'conduct' *of the regulation* had a commercial character." 234 F.3d at 204 (emphasis added). *Groome* recognized that, in analyzing the effect on interstate commerce, courts look only to the expressly regulated activity. In *Groome*, that was the sale and rental of housing. The actor's conduct was commercial in nature, but that characteristic was only relevant insofar as it fell within the regulated activity. *Id.* at 205-16.

Unlike *Groome,* the district court in this case looked primarily beyond the regulated conduct--Cave Species takes--in order to assess effect on interstate commerce. It looked to plaintiffs' planned commercial development of the property where the takes would occur. True, the *effect* of regulation of ESA takes may be to prohibit such development in some circumstances. But, Congress, through ESA, is not directly regulating commercial development.

> To accept the district court's analysis would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors. There would be no limit to Congress' authority to regulate intrastate activities, so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce.
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> *****
>
> In the light of the successful *facial* challenges in *Lopez* and *Morrison* and the emphasis our court and sister circuits have placed on the economic nature *vel non* of the expressly regulated activity, the district court erred in looking primarily to plaintiffs' commercial motivations.

GDF Realty, 326 F.3d at 634-36.

As this extended excerpt indicates, the Fifth Circuit squarely rejected the "Wal-Mart argument" relied upon by the District Court — i.e, the notion that an actor's commercial activity can supply the nexus with interstate commerce even when that commercial activity is not the object of the regulation. *Id.*

In contrast to the Fifth Circuit, the D.C. Circuit expressly adopted its own version of the "Wal-Mart argument." The D.C. Circuit held that, "the regulated activity is the construction of a 202 acre commercial housing development" by Rancho Viejo. *Rancho Viejo*, 323 F.3d at 1068.

By expanding the "substantial effects" inquiry beyond the express terms of the take provision, the D.C. Circuit easily

sustained the application of the take provision to the Arroyo Toad. "To survive Commerce Clause review, all the government must establish is that 'a rational basis exist[s] for concluding that a regulated activity sufficiently affect[s] interstate commerce.' [] And there can be no doubt that such a relationship exists for costly commercial developments like Rancho Viejo's." *Id.* at 1070 (citation omitted).

Rancho Viejo's holding reaffirms the D.C. Circuit's earlier opinion in *National Association of Home Builders v. Babbitt*, 130 F.3d 1041. In *National Association of Home Builders*, the D.C. Circuit held that harm caused to habitat of an intrastate insect (the Delhi Sands Flower-loving Fly) by construction of a hospital and freeway and related use of building materials was a sufficient connection with interstate commerce. *National Association of Home Builders v. Babbitt*, 130 F.3d at 1056; *See also, Gibbs v. Babbitt*, 214 F.3d 483, 497 (4th Cir. 2000) (finding a connection with interstate commerce through the commercial motivations of farmers and others).

The reasoning split between the Fifth Circuit in *GDF Realty* and the D.C. Circuit in *Rancho Viejo* (as well as the D.C. Circuit's earlier opinion in *National Association of Home Builders*) is readily identified because they reach diametrically opposed positions on the same issue. *GDF* holds that commercial development activity causing take of endangered species does not count for the purposes of determining substantial effect; *Rancho Viejo* holds that it does. The split between the Circuits in this critical component of Commerce Clause analysis — determining what activity or conduct "counts" for the purposes of "substantial effect" — is clearly cast in the Courts' respective decisions, is substantial in scope because of its often case-dispositive nature and, therefore, cries out for resolution by this Court.

IV. CONCLUSION

For the foregoing reasons, Amici Curiae respectfully submit that this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 2 8 2004
OFFICE OF THE CLERK

No. 03-761

In the Supreme Court of the United States

RANCHO VIEJO, LLC,
Petitioner
v.
GALE A. NORTON, SECRETARY OF THE INTERIOR, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF OF THE STATES OF TEXAS, ALABAMA, ALASKA, DELAWARE, MICHIGAN, NEBRASKA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does Congress's authority "[t]o regulate Commerce . . . among the several states," U.S. CONST. art. I, §8, cl. 3, permit the application of the Endangered Species Act to purely local activities that might potentially harm the habitat of a wholly intrastate and commercially-irrelevant toad species?

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INTEREST OF *AMICI CURIAE*

The *Amici* States have a long history of protecting wildlife and serving as responsible stewards of our precious natural resources. For that reason, the *Amici* States have a significant interest in maintaining their sovereign control over wildlife regulation and land-use planning within their borders. The court of appeals's decision threatens state control over such decisions and allows Congress to regulate matters of purely state concern without any requirement of a genuine connection to interstate commerce. Moreover, the holding and reasoning of the court of appeals threatens the *Amici* States' ability to develop and administer their own state endangered-species programs.[1] The *Amici* States file this

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1. *See* ALASKA STAT. §§16.20.180–.210; CAL. FISH & GAME CODE §§2050–2115.5; COLO. REV. STAT. §§33-2-101– -108; CONN. GEN. STAT. §§26-303– -316; DEL. CODE tit. 7 §§601–605; FLA. STAT. §§372.072–.074; GA. CODE §§12-6-171– -176, 27-3-130– -133; HAW. REV. STAT. §§195D-2– -31; ILL. COMP. STAT. 10/1–10/11; IND. CODE §§14-22-34-1– -21; IOWA CODE §§481B.1–.9; KAN. STAT. §§32-957– -963, 32-1009– -1012, 32-1033; KY. REV. STAT. §§146.600–.619, 150.183, 150.9990; LA. REV. STAT. §§56:1901– :1907; ME. REV. STAT. tit. 12, §§7751–7759; MD. CODE, NAT. RES. I §§4-2A-01– -09, 10-2A-01– -09; MASS. GEN. LAWS ch. 131A, §§1–6; MICH. COMP. LAWS §§324.36501–.36507; MINN. STAT. §§84.0894–.0895; MINN. R. 6134.0100-0400; MISS. CODE §§49-5-101– -119; MONT. CODE §§87-5-101– -131; NEB. REV. STAT. §§37-801– -811; NEV. REV. STAT. §§244-386–.388, 503.584–.660; N.H. REV. STAT. §§212-A:1– -A:15; N.J. Stat. §§23:2A-1– -14; N.M. STAT. §§17-2-37– -46; N.Y. ENVTL. CONSERV. LAW §11-0535; N.C. GEN. STAT. §§113-331– -337, 106-202.12; OHIO REV. CODE §§1531.24–.26, .99; OR. ADMIN. R. 635-100-0105; OR. REV. STAT. §§496.004, .171, .172–.192, 498.026, 527.610–527.885, 527.992, 564.100–.135; 30 PA. CONS. STAT. §2305; 34 PA. CONS. STAT. §2167; 17 PA. CODE §§45.31–.35; R.I. GEN. LAWS §§20-37-1– -5; S.C. CODE §§50-15-10– -90; S.D. CODIFIED LAWS 34A-8-1– -13; TENN. CODE §§70-8-101– -112; TEX. PARKS & WILD. CODE §§49.015, 68.001– .021; 30 TEX. ADMIN. CODE §330.129; 31 TEX. ADMIN. CODE §§65.171, 69.1; UTAH CODE §§23-13-1– -17; VT. STAT. tit. 10, §§5401–5410; VA. CODE

brief to assert their interest in restoring state control over their resources and returning to the federal-state balance of power secured by the Constitution.

REASONS FOR GRANTING THE WRIT

I. THE ENDANGERED SPECIES ACT IMPERMISSIBLY INTRUDES INTO THE STATES' TRADITIONAL MANAGEMENT OF LAND USE AND PURELY INTRASTATE WILDLIFE, AND IMPEDES THE EFFECTIVE EXERCISE OF THEIR POLICE POWERS.

As the Court has recognized, land use is traditionally an area of state concern. *See, e.g., Solid Waste Agency v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001); *Lake Country Estates v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 402 (1979). Likewise, the conservation and protection of wildlife is also peculiarly within the States' police power, and the States have great latitude in determining the means for that protection.[2] *See Lacoste v. Dep't of Conservation*, 263 U.S. 545, 552 (1924); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1064 (CA DC Cir.1997) (Sentelle, J., dissenting); *see also Hughes v. Oklahoma*, 441 U.S. 332, 337 (1979) (stating that wildlife protection is a legitimate local purpose, similar to the States' interest in protecting the health and safety of their citizens).

Consistent with this tradition, forty States have independent regulatory schemes governing endangered species. *See supra*

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§§29.1-563--570; WASH. REV. CODE §§77.12.020, 77.08.010, 77.15.055, 79.17.040; WIS. STAT. §29.604; *see also* MO. REV. STAT. §252.240; OKLA. STAT. tit. 29, §§5-412, 412.1, 7-206, 7-502--504, 7-601--602.

2. Other areas of traditional state concern include education, criminal law enforcement, and family law. *United States v. Morrison*, 529 U.S. 598, 615-16 (2000); *United States v. Lopez*, 514 U.S. 549, 564 (1995); *id.*, at 580 (Kennedy, J., concurring).

note 1. Several States go even farther, protecting "threatened" species as well. *See, e.g.*, 31 TEX. ADMIN. CODE §§65.171-.184, 69.01-.14; MASS. GEN. LAWS Ch. 131A, §§1-6. Any fear that, without the ESA's application to all intrastate species, endangered species would somehow go unprotected is dispelled by these many state programs. By displacing the state policy choices expressed by state laws protecting endangered species, however, the ESA renders the States' statutes and regulations largely irrelevant and discourages the further development of state regulatory schemes. The States should be allowed, and encouraged, to continue "perform[ing] their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Lopez*, 514 U.S., at 581 (Kennedy, J., concurring).

Not only does the ESA improperly displace the States' efforts to manage wildlife that is unrelated to interstate commerce, the ESA hinders the States in the execution of their police powers as well as their established authority to regulate land use. For example, the ESA has impeded local efforts in several States to clear trees and brush in order to prevent forest fires. *See, e.g.*, Wes Smalling, *Forests, Fire and Fate*, THE SANTA FE NEW MEXICAN, Aug. 10, 2003, at A1; Ben Goad & Jennifer Bowles, *Fire Official Faults Agency//Habitat; Fish and Wildlife Lets Growth Fears Delay Needed Burns, an Inland CDF Chief Says*, THE PRESS-ENTERPRISE, Dec. 16, 2003, at A01 (discussing arroyo toad); Jia-Rui Chong, *California; Federal Agency Faulted in Fires; San Bernadino Officials Say the Fish and Wildlife Service Held Up Crucial Controlled Burns*, LOS ANGELES TIMES, Dec. 15, 2003, at B1. The ESA's prevention or lengthy delay of clearing projects potentially caused, or at least contributed to, the catastrophic fires that occurred in Southern California last year. *See Smalling, supra*; Goad & Bowles, *supra*; Chong, *supra*. In addition to threatening human lives, property, and land, these fires can have potentially devastating collateral effects, such as destruction of critical water supplies. *See*

Smalling, *supra*. Protecting state citizens and their property, as well as safeguarding state forests and water supplies, are undeniably legitimate exercises of States' traditional police powers and should not be constrained by federal regulation of species with no connection to interstate commerce.

In addition to inhibiting the States by extending to species that are outside of Congress's scope of authority, the ESA's take provision also imposes remedies where they already exist. The States have developed protective measures and remedies, *see supra* note 1, and the take provision's needless overlap with some of those requirements, together with its overriding of several others, make it as unnecessary as it is improper when applied to intrastate, non-commercial species. Moreover, the friction between the policy choices of unelected federal officials and state legislatures over the appropriate designation and management of endangered species, as well as the proper sanctions for conduct adversely affecting such a species, only underscores the sensitivity of the issue and the constitutional issues at stake.

The court of appeals's decision validates a federalization of the control of land development through the ESA's take provision. And it ignores the fact that federal control of state resources conflicts with the States' historical independence in carrying out their domestic policy. Forty States have their own endangered species programs, and they must know the limits of Congress's reach in order to plan and administer their programs. Given our Constitution's concern with comity and limited federal power, the Court should grant the petition and review the take provision's impact on the federal-state balance.

II. THE CONFLICT BETWEEN THE D.C. CIRCUIT AND THE FIFTH CIRCUIT'S ANALYSIS OF CONGRESS'S COMMERCE-CLAUSE AUTHORITY PREVENTS THE STATES FROM ASCERTAINING THE REACH OF THE ESA, AND CONFUSES ACCEPTED COMMERCE-CLAUSE ANALYSIS.

Although both ultimately upheld the constitutionality of the ESA, the D.C. Circuit and the Fifth Circuit are divided in their rationales and approach for sustaining the ESA take provision as it applies to non-commercial, intrastate species. The result is that one circuit's commerce-clause analysis permits applications of the take provision that would not be countenanced in the other circuit. That conflict requires resolution by the Court.

A. The Fifth Circuit Expressly Rejected the D.C. Circuit's Adoption of Commerce-Clause Analysis That Turns on the Character of the Actor Affected by the Federal Regulation.

The Fifth Circuit explicitly rejected the brand of commerce-clause analysis adopted by the D.C. Circuit, which measures the reach of Congress's authority by the character of the affected party. Maintaining the commerce-clause analytical inquiry in its proper place, the Fifth Circuit instead assessed the regulated activity, as opposed to the character of the regulated actor. *See GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 634-35 (CA5 2003) (explaining that "looking primarily beyond the regulated activity . . . would 'effectually obliterate' the limiting purpose of the Commerce Clause," and that under such an approach, "the facial challenges in *Lopez* and *Morrison* would have failed"). In contrast, the D.C. Circuit decided to assessed the *effects* of the challenged regulation on interstate commerce rather than "the *activity* being regulated." *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (CA DC 2003) (Roberts, J., dissenting from denial of rehearing en banc).

As the Fifth Circuit explained, the D.C. Circuit's erroneous approach fails to identify the limits of Congress's authority, and instead assesses the affected party's connection to interstate commerce, requiring only that affected parties exhibit general commercial indicia:

> "To accept [such] analysis would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors. There would be no limit to Congress' authority to regulate interstate activities so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce." *GDF Realty*, 326 F.3d, at 634-35.

In the Fifth Circuit, the fact that GDF Realty was engaged in economic activity—commercial real estate development—was simply immaterial. The Fifth Circuit explained that consideration of GDF Realty's "commercial motivations that would underlie the takes" would improperly extend "the scope of this relevant conduct beyond . . . takes." *Id.*, at 633. Unlike the D.C. Circuit, the Fifth Circuit concluded that the proper scope of inquiry is "whether the expressly regulated activity substantially affects interstate commerce, *i.e.*, whether takes . . . have the substantial effect." *Id.* (emphasis omitted).

Thus, the two circuits fundamentally disagree about what a court is to analyze when it looks for the necessary substantial effects on interstate commerce. In one circuit, a court should consider the front-end subject matter of the statute, not the back-end secondary effects of the statute as applied to the facts of a particular case; and in other circuit, the opposite is true. In this case, depending on the circuit, the proper inquiry is either whether a take of an arroyo toad substantially affects interstate commerce, or whether the ultimate hindrance of commercial development of a property (in the name of preventing a take) substantially affects interstate commerce.

By ignoring the actual subject matter of the statute, the D.C. Circuit's analysis leads to inconsistent results depending on nature of the actor. Implicit in its conclusion that the regulated activity was real estate development, *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1069 (CA DC 2003), is a recognition that a take by a non-commercial actor would not substantially affect interstate commerce. If a landowner wanted to eliminate arroyo toads for sport, for religious reasons, for aesthetic preference, or for simple whimsy, the court of appeals's analysis would not support the application of the take provision. That inconsistency undermines the D.C. Circuit's analysis altogether; the constitutionality of the take provision should not turn on the happenstance of the taker's intent or character, nor should it turn on geographic fortuity.

Moreover, the self-justifying nature of the D.C. Circuit's analysis encourages broad, non-specific, and intrusive enactments. No matter what the subject matter, the greater the potential impact of a statute, even if completely unintended, the more likely it is to be upheld on commerce-clause grounds. The capricious results of the D.C. Circuit's analysis, together with its conflict with the Fifth Circuit regarding the proper object of commerce-clause analysis, warrant the Court's examination.

B. The Disagreement Between the D.C. Circuit and the Fifth Circuit About Aggregation of Non-Economic Activities Leaves Commerce-Clause Analysis in Confusion.

In *GDF Realty*, the Fifth Circuit correctly concluded that for any aggregation, "the intrastate instance of activity be commercial." 326 F.3d, at 638. In contrast, the D.C. Circuit rejected the contention that non-economic taking activity [must] could not be aggregated, *Rancho Viejo*, 323 F.3d, at 1071-72 & n.10; *see also Terry v. Reno*, 101 F.3d 1412, 1417 (CA DC 1996) ("The regulated activity . . . need not be commercial, so long as its effect on

interstate commerce is substantial."). The Fifth Circuit explained that if aggregation is utilized to sweep in "any imaginable activity," then it would be preordained that aggregated non-economic activities could in domino effect "reduce national economic productivity," leaving Congress's commerce-clause power without limit. *GDF Realty*, 326 F.3d, at 629. Such reasoning would turn the Commerce Clause "into what it most certainly is not, a general police power." *Id.* (emphasis omitted).

The disagreement between the two circuits regarding proper aggregation injects yet more confusion into the state of commerce-clause analysis, precluding any predictable analysis for the States and providing further reason for the Court's review.

C. The Fifth Circuit's Rationale Was Also Flawed and Its Analysis Was Inconsistent with the Approach of the D.C. Circuit.

The Fifth Circuit ultimately sustained the application of the take provision to intrastate, non-commercial species because it viewed the ESA as a whole as "an economic regulatory scheme," *id.*, at 640, and decided that takes of an intrastate, non-commercial species could be aggregated with other takes because, in its view, the regulation of any species is an essential part of the larger regulatory scheme, *id.*, at 638-39, 640. In so concluding, the Fifth Circuit accepted a premise advanced by the Fish and Wildlife Service—a premise that was not relied upon by the D.C. Circuit—that takes of *any* species necessarily threaten the "interdependent web" of all species. *See id.*, at 640. Through this "interdependent web" conjecture, the Fifth Circuit collapsed activities related to commercial and interstate species with the admittedly non-commercial, Texas cave species at issue in *GDF Realty*.

The D.C. Circuit did not rely on the interdependent web theory; instead, it relied upon the commercial nature of the affected actor. This incongruity provides further reason for the Court's review.

III. THE D.C. CIRCUIT'S INCONSISTENCY WITH THIS COURT'S COMMERCE-CLAUSE PRECEDENT WARRANTS REVIEW.

Both circuits' rationales are not only at odds with each other, but they are inconsistent with this Court's commerce-clause precedent and the Court's insistence on a meaningful distinction between that which is national and that which is truly local.

The Court has construed the Commerce Clause to permit Congress to regulate three areas of commercial activity: (1) the use of the channels of interstate commerce; (2) the instrumentalities of, or persons or things in, interstate commerce; and (3) other activities that "substantially affect" interstate commerce. *Lopez*, 514 U.S., at 557-59. It is common ground that the take provision does not come within the first two commerce-clause safe harbors. With regard to the last category, the key inquiry is whether the regulated activity "substantially affects" interstate commerce, 514 U.S., at 557 n.2, 562, or whether the relationship between the regulated activity and interstate commerce is too attenuated to be regarded as substantial, *id.*, at 563-67, that is, whether the rationale "would . . . convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States," *id.*, at 567. The court of appeals's decision runs afoul of the Court's mandate that substantial effects must be understood to impose meaningful limits on congressional power under the Commerce Clause.

A. The D.C. Circuit's Approval of Congressional Regulation of Non-Economic Intrastate Activity Is at Odds with the Court's Insistence on Economic Activity.

The take provision's purpose is wildlife preservation, not economic regulation. *See, e.g., Wyo. Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1237 (CA10 2000). And there is no dispute that there is no national market for arroyo toads, nor any evidence suggesting that the toads are the subject of any

commercial activity. *See Rancho Viejo*, 323 F.3d, at 1072. Nevertheless, because the affected party was commercial, the D.C. Circuit authorized the application of the take provision to the intrastate toad.

The D.C. Circuit's endorsement of congressional regulation of local activities affecting species lacking commercial effects stands conspicuously apart from the Court's decisions linking commerce-clause authority to economic activity. In *Lopez* and *Morrison*, the Court recognized that the Commerce Clause does not extend to non-commercial intrastate activity. *Morrison*, 529 U.S., at 611, 613 ("Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."); *Lopez*, 514 U.S., at 559-61 (explaining that Gun-Free School Zones Act had nothing to do with "commerce" or any sort of economic enterprise); *id.*, at 580 (Kennedy, J., concurring) (observing that neither the actors nor their conduct had commercial character, nor did the statute evidence a commercial nexus). Moreover, the Court's review of commerce-clause decisions in *Morrison* and *Lopez* demonstrates that when the Court has sustained federal regulation of intrastate activity based on the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor. *Morrison*, 529 U.S., at 611; *Lopez*, 514 U.S., at 559-60. The necessity of economic activity is confirmed by *Morrison*'s express rejection of the claim that Congress could regulate non-economic conduct based solely on that conduct's aggregate effect on interstate commerce. 529 U.S., at 617. While one can always identify commercial effects of non-economic regulation, as the losing parties had done in both *Lopez* and *Morrison*, the Court made clear that intrastate activity must be economic to be regulated. *Id.*, at 610-11 (citing *Lopez*, 514 U.S., at 559).

Nothing about the application of the take provision in this case suggests any economic or commercial activity. Even under the most indulgent view, application of the take provision to non-

commercial, intrastate species has far fewer commercial qualities than the guns-around-schools legislation invalidated in *Lopez*. *See Lopez*, 514 U.S., at 567 ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."). And the provision does not approach such economic activities as intrastate coal mining, *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), intrastate extortionate credit transactions, *Perez v. United States*, 402 U.S. 146 (1971), inns and hotels catering to interstate guests, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), restaurants using substantial interstate supplies, *Katzenbach v. McClung*, 379 U.S. 294 (1964), or even—with the reach of the Commerce Clause at its apogee—the production and consumption of homegrown wheat, *Wickard v. Filburn*, 317 U.S. 111 (1942).

The commercial nature of these activities simply finds no parallel in the application of the take provision to the intrastate arroyo toad. As in *Lopez*, the application of the take provision "has nothing to do with 'commerce' or any sort of economic enterprise." 514 U.S., at 561. The take provision applied to an intrastate species without commercial effect simply does not "substantially affect" interstate commerce, at least if this limit on congressional authority is to remain meaningful.

B. The D.C. Circuit's Focus on the After-Effects of a Regulation Contradicts the Court's Focus on Regulated Activities.

The court of appeals's effects-based analysis largely ignores Congress's actual intentions and, consequently, is foreign to the four-part review required by *Morrison*. *See* 529 U.S., at 609-12. By looking for a jurisdictional element and reviewing congressional findings regarding the regulated activity's effect on interstate commerce, the *Morrison* formulation leaves no doubt that the

proper focus of commerce-clause analysis is the direct subject of the statute (*i.e.*, taking of intrastate non-commercial species), rather than some unspecified effect that is only later discovered and is dependent on the specific actor in question. Indeed, in *Solid Waste Agency*, the Court noted that aggregation based on the nature of the actor, rather than on the activity that was the object of the regulation, "would raise significant constitutional questions." 531 U.S., at 173-74. Contradicting the Court's focus on the activity "to which the statute by its terms extends," *id.*, the D.C. Circuit limited itself to the nature of the affected party and his activity, holding that the "precise activity" to be considered was the planned commercial development, *Rancho Viejo*, 323 F.3d, at 1072. This inconsistency with the Court's decisions provides yet another reason for the Court's review.

C. The Court of Appeals's Decision Weakens the Court's Prohibition Against Attenuation to the Point of Non-Existence.

The court of appeals's approval of an extremely attenuated connection to interstate commerce effectively eliminates the distinction between what is national and what is local. The court of appeals engaged in the very same kind of attenuated reasoning to justify congressional regulation of intrastate activities that the Court rejected in *Lopez* and *Morrison*. *See Morrison*, 529 U.S., at 612; *Lopez*, 514 U.S., at 567.

The court of appeals's reasoning makes a plausible case for the position that activities of one intrastate species, might like a rock thrown into a pond, have effects that could lead to other effects that would potentially affect interstate commerce. But that argument proves too much; such reasoning would allow Congress to regulate any intrastate activity, including areas of traditional state regulation, such as education, crime, and family law. *See Morrison*, 529 U.S., at 615-16; *cf.*, *Lopez*, 514 U.S., at 564. *Lopez* and *Morrison* both

rejected this rationale as inconsistent with the doctrine of enumerated federal powers. *Morrison*, 529 U.S., at 616-18; *Lopez*, 514 U.S., at 567-68. Like the regulation of intrastate violence invalidated in *Morrison*, the regulation of intrastate species that is not directed at the instrumentalities, channels, or goods involved in intrastate commerce "has always been the province of the states." 529 U.S., at 618. The activities at issue are inherently local in nature, and involve precisely the kinds of policy choices that State governments have historically been responsible for making.

The rationale offered by the court of appeals for meeting the "substantial effects" test also fails to circumvent the same pitfall that doomed the law at issue in *Lopez*. In *Lopez*, the rationales offered to sustain the law each violated the bedrock principle animating the Court's commerce-clause cases—that is, whatever the explanation for the exercise of power, it cannot convert a commerce power of limited reach into one of unbounded breadth. 514 U.S., at 563-68. The government, for example, argued that firearms possession in a school zone could result in violent crime, which in turn could create substantial insurance costs throughout the country or create disincentives to travel to parts of the country that appeared to be unsafe. *Id.*, at 563-64. It also argued that firearms possession in a school zone could threaten the learning environment, which in turn could result in a less productive citizenry. *Id.*, at 564. The problem, the Court concluded, was that it was "hard pressed to posit any activity by an individual that Congress is without power to regulate" under these explanations. *Id.* The D.C. Circuit's reasoning similarly lacks a stopping point.

The D.C. Circuit's attenuated connection to interstate commerce abandoned the Court's view that "the Constitution's enumeration of powers . . . presuppose [s] something not enumerated" and in the process abandoned the "distinction between what is truly national and what is truly local." *Id.*, at 567-68. As the Court reaffirmed in *Lopez* and *Morrison*, the powers delegated to the federal

government are few and defined, while those that remain in the state governments are numerous and indefinite. *Morrison*, 529 U.S., at 618 & n.8; *Lopez*, 514 U.S., at 552 (citing THE FEDERALIST No. 45, at 292-93 (James Madison) (Clinton Rossiter ed. 1961)). The D.C. Circuit's reasoning turns this balance on its head by granting the federal government essentially a broad police power over endangered species, regardless of their connection to interstate commerce.[3]

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3. This conflict is clear today and is unlikely to sharpen or develop any further with the passage of time. *See Rancho Viejo*, 334 F.3d, at 1160 (Sentelle, J., dissenting from denial of rehearing en banc) ("This decision of the court continues a line of cases in conflict with Supreme Court jurisprudence . . .".). Nor can it be resolved without the Court's review. Indeed, the court of appeals's decision is emblematic of the confusion in the lower courts regarding Congress's commerce-clause authority. *See, e.g., Raich v. Ashcroft*, 352 F.3d 1222 (CA9 2003) (enjoining as likely beyond Congress's commerce-clause authority, extension of Controlled Substances Act, 21 U.S.C. §801, to intrastate, non-commercial cultivation and possession of cannabis for personal medical purposes); *United States v. Laton*, 352 F.3d 286 (CA6 2003) (rejecting, over Judge Sutton's dissent, commerce-clause challenge to federal arson statute applied to local fire station burned by local official); *United States v. Darrington*, 351 F.3d 632 (CA5 2003) (rejecting commerce-clause challenge to the felon-in-possession statute, 18 U.S.C. §922(g)(1)); *United States v. McFarland*, 311 F.3d 376 (CA5 2002) (*en banc*) (affirming conviction by reason of an equally divided court on the issue whether Congress has commerce-clause authority to extend the Hobbs Act to robberies of local retail stores). Moreover, because a decision by the D.C. Circuit on the proper scope of a federal regulation stands as substantial and unavoidable precedent in any circuit, it should not be left unreviewed.

D. In the Interests of Preservation of Our Dual Sovereignty and Federalism's Role as One of the Counter-Majoritarian Guarantees That Preserve Liberty, the Court Should Grant the Petition.

The division of authority in our federal system is not merely an empty distinction of a bygone era. *See Lopez*, 514 U.S., at 552. Rather, it continues to have force as a means of "secur[ing] to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, 181 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)). Far from protecting state sovereignty for its own sake, the goal of federalism is to maintain the freedoms that only divided and dispersed government can provide. As the Court has recognized, "a healthy balance of power between the State and the Federal Government will reduce the risk of tyranny and abuse from either front. . . . In the tension between federal and state power lies the promise of liberty." *Gregory v. Ashcroft*, 501 U.S., 452, 458-59 (1991).

No matter how virtuous the public policy objectives—making society safe for law-abiding citizens, rooting out gender-motivated violence, or even protecting our natural resources—there are necessarily constitutional limitations. *Cf. Morrison*, 529 U.S. 598; *Lopez*, 514 U.S. 549. The Court's history is one of safeguarding structural and individual-rights guarantees of liberty against the exigencies of the moment. Just as the Court has not hesitated to consider issues of individual-liberty rights against society's need for collective security, nor hesitated to ensure an appropriate separation of powers among the national branches of government, it should likewise act to protect the foundational principle that Congress has limited and enumerated powers. The objective of the Framers after all was to "split the atom of sovereignty." *Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)). Because

federalism is a sustaining principle of our Republic, and the court of appeals's decision misapprehends the dividing line between the Congress and the sovereign states, the Court should grant the petition.

CONCLUSION

The Court should grant the petition.

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January 2004

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